(18864)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 234.

WILLIAM A. WRIGHT, COMPTROLLER GENERAL, PETITIONER,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the first Monday of October, 1902, and held in the court room of said court, in the city of Atlanta, Georgia, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

WILLIAM A. WRIGHT, Comptroller General, Appellant,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Appellees. } No. 1156.

Be it remembered that heretofore, to-wit: on the 28th day of April, 1902, a transcript of the record of the above styled cause from the circuit court of the United States for the northern district of Georgia, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit in the words and figures following, to-wit:

1 *Bill.*

UNITED STATES OF AMERICA,
Northern District of Georgia.

To the honorable the judges of the circuit court of the United States for the northern district of Georgia:

The Louisville and Nashville Railroad Company, which avers itself to be a corporation created and existing under the laws of the State of Kentucky, and a citizen of the State of Kentucky, with its principal office at the city of Louisville in said State; and The Atlantic Coast Line Railroad Company, a corporation created and existing under the laws of the State of Virginia, and a citizen of the State of Virginia, with its principal office in said State at the city of Petersburg; said parties being hereinafter styled orators, bring this their bill of complaint against William A. Wright, a citizen of the State of Georgia, resident in the northern district thereof, in the city of Atlanta, and against the Georgia Railroad and Banking Company, a corporation created and existing under the laws of the State of Georgia, with its principal office in the city of Augusta in said State. And thereupon your orators complain and say:

1. That the several parties plaintiff and defendant are citizens and residents as hereinbefore stated.

2. That the matter in controversy exceeds, exclusive of interest and costs, the sum or amount of two thousand ($2,000) dollars, and is a controversy between citizens of different States.

3. Your orators show that on the 7th day of May, 1881, the said Georgia Railroad and Banking Company, hereinafter styled the Georgia Company, made and entered into a certain indenture of lease with William M. Wadley, wherein and whereby it leased to him and his assigns for and during the term of ninety-nine (99) years from and after the first day of April, 1881, all of the railroads and rights of transportation of the said Georgia Company, and certain other properties and interests of said Georgia Company; in which said lease the following property and interest was devised, to-wit: all of the rights of ownership, management, control and use of the Western Railroad of Alabama, which the said Georgia Company then had or was entitled to; the same being an undivided one-half (½) ownership in fee simple of the said railroad and franchises of the said Western Railroad of Alabama, which the said Georgia Company had under the authority of an act of the legislature of Georgia, approved the 27th day of February, 1875, acquired; the Central Railroad and Banking Company acquiring and being the owner of the other half interest therein, under and by virtue of the same act.

4. Orators show that under and by the terms of said lease the said lessee or his assigns covenanted to keep the railroads and appurtenances and means of transportation leased, in first-class condition and to indemnify the Georgia Company against any damages, losses or liabilities which might be incurred by reason of the operating of the railroads so leased; and further agreed with the termination of the lease that they would return the property therein rented farmed out and assigned, in as good condition as received, and unimpaired in value, that is to say, as well adapted to the business of transportation as said leased property then was. Said lessee also covenanted and agreed for himself and assigns, that he would pay all taxes which might be payable upon any of said leased property, except such taxes as under the charter of the Georgia Company might be payable upon the rental reserved by the lease, or such part thereof as might be taxable, or as might be collectible by law from the Georgia Company on the shares of its stock in the hands of its shareholders, and that said lessee and his assigns thereby became specially charged with the payment of all taxes upon the half interest of said Georgia Company in the said Western Railroad of Alabama as it then existed or might thereafter exist.

5. Orators show that by the terms of said lease it was agreed that said Western Railroad of Alabama might be by its owners incorporated, and that when so incorporated the shares of stock representing the interest of said Georgia Company in said lease should as to possession, voting and all other matters be governed by the terms of said lease.

6. Orators show that said William M. Wadley went into possession of all the properties demised under said lease, including said

one-half interest of said Georgia Company in said Western Railroad of Alabama, and that shortly thereafter the interest of said William M. Wadley in said lease became vested in your orator The Louisville & Nashville Railroad Company and in the Central Railroad
3 & Banking Company of Georgia, as co-lessees. That, subsequently, by different assignments the entire interest in said lease and the ownership thereof became vested in your orator The Louisville and Nashville Railroad Company, and that your orator the said Louisville and Nashville Railroad Company was accepted by said Georgia Company as the sole lessee of said demised property. That under said lease, among other things it is provided, that securities of the value of one million ($1,000,000) dollars shall be deposited to secure the faithful performance by said lessee of the covenants of said lease as in said lease specified; and that your orator the said Louisville and Nashville Railroad Company after being accepted as such sole lessee made said deposit of said securities, and the same were accepted by the said Georgia Company, and your orators recognized as such sole lessee as aforesaid.

7. Orators show that since said time, to-wit: on or about the first day of July, 1899, your orator, The Atlantic Coast Line Railroad Company acquired from the said Louisville and Nashville Railroad Company by assignment a one-half interest in said lease, and all the rights and privileges thereof, and was accepted by the said Georgia Company as a co-lessee with said Louisville and Nashville Railroad Company; and it and the said Louisville and Nashville Railroad Company are now the co-lessees of said Georgia Railroad and Banking Company under said lease, and are entitled to all the rights, privileges and properties, and subject to all the duties and burdens therein conveyed and thereby specified. A copy of said lease will be to the court shown upon the trial of this cause.

8. Orators show that the said Western Railroad of Alabama extends from the city of West Point, in the State of Georgia, to the city of Selma, in the State of Alabama. That all of said railroad except about one-quarter (¼) of a mile in length lies in the State of Alabama. That such portion of said road as lies within the State of Georgia was built by the express permission of the State of Georgia, and the said railroad was by act of the legislature granted permission to build the same within the limits of this State.

9. Orators show that it and its predecessors in said lease have at all times since the commencement of said lease paid to the State of Georgia and to the State of Alabama, in respect to the several portions of said Western Railroad of Alabama lying, respectively,
4 in each, and in the several counties of each, all taxes which have been assessed thereon and demanded by said States of Alabama and Georgia, respectively, or by the several counties and cities of said States.

10. Orators show that some time durnig the year 1875, the property now known as the Western Railroad of Alabama was purchased at foreclosure sale under and by virtue of the aforesaid act of the legislature of Georgia authorizing them so to do, by the said Georgia

Railroad & Banking Company and the Central Railroad and Banking Company of Georgia, and the said two railroad companies went into possession of the said Western Railroad of Alabama and operated the same for a number of years as tenants in common, without any further or other charter, and without organizing the same as a separate corporation. That said railroad was being so operated at the time the said indenture of lease above mentioned was executed by said Georgia Company to the said William M. Wadley, and that it continued to be so operated by the said Central Railroad and Banking Company of Georgia and by the said Wadley and his assigns for a short period after the execution of said lease. That not long after the execution of said lease, and in accordance with the permission therein accorded the owners of the said Western Railroad of Alabama, viz.: the said Georgia Company and the Central Railroad and Banking Company of Georgia, organized a corporation under the laws of the State of Alabama, known as the Western Railway of Alabama, for the purpose of operating said Western Railroad of Alabama, and issued stock in said corporation as evidence of the ownership of said two railroad companies, to-wit: fifteen thousand (15,000) shares each, or a total capital of three million ($3,000,000) dollars. Said charter was obtained from the State of Alabama, and the same was organized as an organization under the laws of the State of Alabama, and has remained so ever since, owning no property in the State of Georgia except the small portion of railroad hereinbefore set forth—the same being located in the county of Troup in said State.

11. Orators show that while said fifteen thousand (15,000) shares of stock were issued in the name of the Georgia Railroad and Banking Company, the control of said stock and the power to vote the same has been at all times under said lease, and by virtue of the irrevocable powers of attorney executed thereunder, vested in the lessees or their assigns, and that all liability to pay any taxes which may be due or collectible on said shares of stock has been at all times under said lease an obligation of said lessees and assigns, and not of the said Georgia Company.

12. Orators show that while all taxes have been paid which have been required by either the States of Georgia or Alabama, or any county or city thereof, on said Western Railroad of Alabama, no taxes have at any time up to the present year been demanded, either of them or their predecessors under said lease, or of the said Georgia Company, on account of or on said shares of stock, but that the same have been recognized as not being taxable, and as being merely the evidence of the ownership of the said railroad property which said shares of stock represent.

13. But your orators show that within the last few weeks the said W. A. Wright, who is comptroller general of the State of Georgia, acting as such comptroller general, has demanded of the said Georgia Company that it pay taxes to the said State of Georgia for the year 1900; the said taxes amounting to about seven thousand ($7000) dollars or other like large sum, as due to the State of Georgia for

State taxes upon said shares of stock of the Western Railway of Alabama.

* * * * * * *

(Stricken by plaintiff by leave of the court.)

15. Orators show that the said amount of taxation will for the remaining years of said lease amount to a very large sum and constitute a great and additional burden upon your orators as lessees of said property, if the same can be collected.

16. Orators show that said Georgia Company under the terms of the lease between itself and orator is not liable to pay the taxes above demanded, and has no present interest in resisting the same. That the same will not in anywise diminish the revenue which the said Georgia Company will receive, nor in any way deplete the same when received; and orators upon information and belief charge that the said Georgia Company will not resist the payment of said taxes, and that the said Georgia Company is about to return the same to the said comptroller general in its tax returns; and that if the said comptroller general shall issue execution against it for taxes thereon, will not resist the payment of the same, but will suffer the same to be collected out of the property leased by your orators, and your orators will suffer the impairment of their rights under said
6 lease, and their enjoyment of such portion of the leased property as may be seized for the purpose of making the said taxes.

17. That your orators will be without legal remedy to resist the payment of said taxes if so coerced, and will be without remedy unless they are now afforded a remedy by this honorable court in this proceeding.

18. Orators aver that under the laws of the State of Georgia, the said shares of stock are not liable to taxation, and that said comptroller general will be proceeding without law or color of law in attempting to collect the same. But so it is, that the said comptroller general has notified said Georgia Company and your orators that he proposes to issue executions and to proceed forthwith to enforce the payment of said taxes if the same are not voluntarily paid.

19. Your orators show that the attempted collection by the said comptroller general of taxes upon these shares of stock of the Western Railroad of Alabama, and the enforcement of such pretended tax, will take their property without due process of law, and denies to them the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States, and is therefore illegal and void.

20. Your orators show that said attempt to collect said tax is illegal and void, also:

(*a.*) Because there is no law in the State of Georgia authorizing the taxation of railroad shares of stock in the hands of the owners thereof.

(*b.*) Because under the laws of the State of Georgia, shares of railroad stock are mere representations of the railroad property itself, and such property must be taxed under the laws of the State of

Georgia for the taxation of railroads where located in the State of Georgia, and where not located in the State of Georgia is not subject to be taxed by the State of Georgia.

(c.) Because if taxes were levied upon this stock, the property which it represent- being located in the State of Alabama, the result would be taxation by the State of Georgia of property located in the State of Alabama, which is illegal.

(d.) Because the said State of Georgia doth not tax under its laws railroad shares issued by railroad corporations of the State of Georgia, but recognizes the same as mere certificates of interest in the
7 railroad property which is itself taxed, and there is no law of the State of Georgia creating any other or different rule for railroad shares issued upon properties lying without the State of Georgia.

21. Your orator being remediless under the rules of common law and unable to obtain any relief except in a court of equity, to the end that the several defendants may, if they can, answer the several charges hereinbefore made against them, waive discovery from the said defendants and each of them, and pray:

1st. That it be adjudged that the said shares of stock passing to your orators under said lease are not subject to be taxed by the said State of Georgia.

2nd. That the said Georgia Railroad & Banking Company be enjoined from making any return of said shares of stock for the purpose of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed.

3rd. That the said William A. Wright, comptroller general, be enjoined from issuing any execution or taking any step to collect any taxes upon said shares of stock, and that it be further decreed that he is without warrant or authority at law to undertake to collect taxes thereon, and is not authorized as comptroller general so to do.

4th. That your orators may have all other and further relief that their case may require and equity afford.

5th. May it please your honors to grant unto your orators not only the writ of injunction issuing out of this honorable court, and directed to the said defendants, enjoining them as above prayed, but also the writ of subpœna directed to the said Georgia Railroad & Banking Company and the said William A. Wright, as defendants herein, commanding them under a penalty to be therein named and at a date to be therein fixed, to be and appear in this honorable court to answer the premises and abide the further order and decree of the court.

And your orators will ever pray, etc.

JOS. B. & BRYAN CUMMING,
Solicitors for Complainants.

KING & SPALDING, *Of Counsel.*

8 STATE OF GEORGIA, }
Richmond County. }

You, Thomas K. Scott, do swear that you are the general manager for the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company, as lessees under the lease executed by the Georgia Railroad & Banking Company to William M. Wadley described in the foregoing bill of complaint, and that as such you are the chief executive officer of said lessees in respect to said leased premises and the operations under said lease. That the matters and things in the foregoing bill stated are true of your own knowledge, except where stated upon information and belief, and that these you verily believe to be true.

THOS. K. SCOTT.

Sworn to and subscribed before me this 13th day of August, A. D. 1901.

[SEAL.] GEO. K. CALVIN,
U. S. Commissioner for Southern District of Georgia.

Filed in clerk's office 22nd day of August, 1901.

O. C. FULLER, *Clerk*,
By J. D. STEWARD, *Deputy*.

UNITED STATES OF AMERICA, }
Northern District of Georgia. }

LOUISVILLE AND NASHVILLE RAILROAD CO. and THE ATLANTIC COAST LINE RAILROAD CO., Complainant-,
and
WILLIAM A. WRIGHT and THE GEORGIA RAILROAD & BANKING COMPANY, Defendant-. } In Equity.

The President of the United States to William A. Wright and the Georgia Railroad and Banking Company:

For certain causes offered before the judges of the circuit court of the United States for the northern district of Georgia, in equity, you and each of you, are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Atlanta, at rules to be had on the first Monday in October (1901) next, to answer to those things which shall then and there be objected to you by the bill of complaint of the Louisville & Nashville Railroad Co., *et al.*, and to do further, and receive what the said court shall have considered in this behalf, and this
9 you may in no wise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 22d day of August, in the year of our Lord, one thousand nine hundred and one.

[SEAL.]

O. C. FULLER, *Clerk*,
By J. D. STEWARD,
Deputy Clerk.

MEMORANDUM.—The defendants are required to enter their appearance in the suit above stated, in the clerk's office, on or before the day at which this writ of subpœna is returnable, otherwise the bill may be taken *pro confesso*.

O. C. FULLER, *Clerk*,
By J. D. STEWARD,
Deputy Clerk.

Due and legal service of the within subpœna hereby acknowledged. Copy and further service waived. Copy of bill received. This Aug. 22, 1901.

J. M. TERRELL,
Att'y Gen'l, Of Counsel for W. A. Wright, Comp. Gen'l.
THE GEORGIA RAILROAD AND BANKING COMPANY,
By JACOB PHINZY, *President.*

August 26, 1901.

(Indorsed:) No. 1133, in equity. In the circuit court of the United States, for the northern district of Georgia. October rules, 1901. Louisville & Nashville R. R. and Atlantic Coast Line R. R. Co., complainant-, and William A. Wright and Georgia R. R. & Banking Co., defendant-. Subpœna. Returned into clerk's office, and filed Aug. 30th, 1901. O. C. Fuller, clerk. King & Spalding, complainant's solicitors.

Appearance.

In the Circuit Court of the United States for the Northern District of Georgia.

LOUISVILLE & NASHVILLE R. R. CO. ET AL., Complainants,
vs.
WILLIAM A. WRIGHT ET AL., Respondents.
} In Equity.

To O. C. Fuller, clerk U. S. circuit court:

You will please enter our appearance for respondents in the above stated case.

10 At Atlanta, Ga., this 2nd day of November, 1901.

J. M. TERRELL,
Solicitor for Respondent Wm. A. Wright, Comp. Gen'l.

Entered and filed this 2nd day of Nov. 1901.

O. C. FULLER, *Clerk.*

Answer of William A. Wright, Comptroller General.

In the Circuit Court of the United States for the Northern District of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and The Atlantic Coast Line Railroad Company
vs.
WILLIAM A. WRIGHT, Comptroller General, ET AL. } Bill in Equity.

Answer of William A. Wright, comptroller general.

The defendant, William A. Wright, comptroller general, for answer to the bill, or so much thereof as he is advised it is material for him to make answer thereto, saveth:

1. That under the rule of this court allowing matters of demurrer to be set up by way of answer, he avers as reason why the relief prayed for in the above stated case should not be allowed, the following:

(a.) That said complainants have not by their said bill made such a case as entitle them in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any of such matters.

(b.) That there is no equity in said bill.

(c.) That complainants have full, adequate and complete remedy at common law.

2. In addition to the above stated matters of law as reasons why the relief prayed for should not be granted, this defendant adopts as his answer in this case the averments of fact contained in the agreed statement of facts this day filed in said case, and by reference makes said agreed statement of facts a part of his said answer.

3. Defendant denies so much of the allegation in paragraph 9 of the bill as alleges the payment by the Western Railway of Alabama or the Western Railroad of Alabama of any taxes to the State of Georgia, or any county or city thereof.

BOYKIN WRIGHT,
J. M. TERRELL,
Attorney General,
Of Counsel for Defendant.

Filed in office, this January 2nd, 1902.

O. C. FULLER, *Clerk.*

11 *Opinion.*

In the Circuit Court of the United States for the Northern District of Georgia.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY and The Atlantic Coast Line Railroad Company
vs.
WILLIAM A. WRIGHT, Comptroller General, ET AL. } No. 1133.

This is a bill filed by the complainants against William A. Wright, comptroller general, to enjoin the latter from collecting from the Georgia Railroad & Banking Company, State taxes on certain shares of stock in the Western Railway of Alabama, complainants being the lessees of the Georgia railroad and liable under the terms of the lease for taxes assessed against it.

The following stipulation has been entered into by the parties in writing and filed with the record in the case:

"In order to obviate the making of proof in the foregoing case it is agreed between the parties as follows:

1. That the citizenship and residence of the several parties plaintiff and defendant are as stated in said bill of complaint, and that the amount in controversy therein involved exceeds the sum of two thousand dollars, exclusive of interest and costs.

2. It is agreed that the Georgia Railroad & Banking Company did on the 7th day of May, 1881, enter into a certain indenture of lease with William M. Wadley and assigns, and that a copy of said lease hereto attached and marked Exhibit "A" shall be taken as a true copy thereof, and shall be used and admitted in evidence in lieu of the original.

3. It is further agreed that subsequently, on February 2nd, 1898, by different assignments, the Louisville & Nashville Railroad Company became the sole assign of said lease, and the lessee of said leased property and interest described therein in lieu of the said Wadley, and was accepted by the Georgia Railroad & Banking Company as such sole lessee, and that it, after being accepted, deposited one million dollars of securities acceptable to the Georgia Railroad & Banking Company, to secure the faithful performance of said lease according to the covenant made in said lease in respect to the making of such deposit.

4. It is further agreed that on or about the — day of —— 1899, the Atlantic Coast Line Railroad Company, acquired from the Louisville & Nashville Railroad Company by assignment, a
12 one-half interest in said lease, and was accepted by the Georgia Railroad & Banking Company as a co-lessee with said Louisville & Nashville Railroad Company, and that the said Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company are now the co-lessees of said lease and hold the same as

fully and to all intents and purposes as the said William M. Wadley did.

5. It is agreed that the Western Railroad of Alabama is a railroad extending from the city of Selma via the city of Montgomery in the State of Alabama, to the city of West Point in the State of Georgia, and that all of said railroad except one-fourth of a mile in length lies in the State of Alabama; that the portion of said road lying in the State of Georgia was built in this State by virtue of an act of the General Assembly of the State of Georgia, passed on the 26th day of December, 1837, incorporating the stockholders of the Montgomery Railroad Company under the name and style of the Montgomery & West Point Railroad Company, within the corporate limits of the town of West Point. That this corporation subsequently became the Western Railroad Company of Alabama, and as such owned said railroad, including the part thereof so built under said act of 1837, in the city of West Point, Georgia. It is agreed that said act is a public law of the State of Georgia, and as such to be taken judicial notice of by the courts, and may be referred to as though herein set out, and is to be found in the published Acts of 1837, pages 201, 202.

6. It is further agreed that all of the property of the Western Railroad Company of Alabama, including the said portion lying in the State of Georgia, was during the year 1875, offered for sale under a foreclosure of mortgage existing thereon, and was sold at judicial sale, and that the said property was purchased by the Georgia Railroad & Banking Company and the Central Railroad & Banking Company of Georgia, two railroad companies of the State of Georgia, under and by virtue of an act of the General Assembly of the State of Georgia, enacted on the 27th day of February, 1875, and entitled "An act to authorize and provide for the purchase of the Western Railroad of Alabama, its property and franchises by the Georgia Railroad & Banking Company and the Central Railroad & Banking Company of Georgia, or either of them, and to authorize said companies to issue bonds in certain cases and to authorize connecting lines to aid in said purchase and issue bonds therefor, and for other purposes," which said act is published in the Acts of the General Assembly of 1875, pages 235 and 236; and it is agreed it is a public law and may be referred to as though herein fully set out.

13 7. It is further agreed that said two last named railroad companies held said Western Railroad & Alabama without incorporating the same, and operated the same as tenants in common until after the making of the said lease hereto exhibited, to William M. Wadley. That on the — day of ——, 188–, a charter was applied for under the general laws of the State of Alabama, and a certificate of such charter was issued by the secretary of state for the State of Alabama, in conformity with such laws incorporating the Western Railway of Alabama, and that to that corporation so incorporated the said Georgia Railroad & Banking Company and the Central Railroad & Banking Company of Georgia conveyed the Western Railroad of Alabama, extending from Selma, Alabama, via

Montgomery, to a connection with the Atlanta & West Point railroad in the city of West Point, Georgia, and that they received from said new corporation its entire capital stock, to-wit: 15,000 shares of one hundred dollars each to the Georgia Railroad & Banking Company, and 15,000 like shares to the Central Railroad & Banking Company of Georgia, or a total capital stock of three million dollars, or 30,000 shares of one hundred dollars each. That said railroad company so incorporated is a corporation of the State of Alabama, and own- no property in the State of Georgia except the small portion of railroad hereinbefore set out which is located in the county of Troup.

8. It is further agreed that the 15,000 shares of stock were issued to, and stand in the name of, the Georgia Railroad & Banking Company, but that an irrevocable power of attorney or proxy to vote the same has at all times been issued and existed under said lease in favor of the lessees or assigns, or such person as they might designate to vote said shares.

9. It is agreed that the blank annually furnished by the comptroller general to the Georgia Railroad & Banking Company to use in making its tax returns contained amongst others the following questions, to-wit: "Number stocks and bonds owned by the company," and "Value of all property not enumerated, and value of tools." That in no other way than in furnishing these blanks did the comptroller general make any demand for taxes upon said shares of stock until about the 25th of May, 1901, when he specifically remanded of the Georgia Railroad & Banking Company that it pay taxes on said shares of stock for the year 1900 to the State of Georgia, which said taxes so demanded amount to between $7000 and $8000. A copy of said blank is attached.

10. It is further agreed that it is provided by the terms of
14 said lease that whatever taxes are collectible from said stock during the entire term of said lease Exhibit "A," are payable by the lessees thereunder, or if the same are lawfully collected from said Georgia Railroad & Banking Company, that said lessees are liable to reimburse the same to said Georgia Railroad & Banking Company, without in any way diminishing the rental which is payable by said lessees under said lease.

11. It is further agreed that stockholders in the Atlanta & West Point Railroad Company, the Georgia Railroad & Banking Company, the Augusta & Savannah Railroad Company, and of all corporations which pay taxes upon their property to the State of Georgia, do not return their shares of stock for taxation.

12. It is further agreed that the Code of Alabama shall be admitted without proof.

The foregoing statement of facts, signed by counsel for the respective parties, sufficiently shows all the facts pertinent to the question involved here, which is, whether shares of stock in the Western Railway of Alabama, an Alabama corporation held by the Georgia Railroad & Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia.

One additional fact may be mentioned. It is alleged in the bill and not denied in the answer, or negatived in any way in the agreed statement of facts, that the Western Railway of Alabama has paid all State and county taxes required of it in the State of Alabama.

It may be conceded first, as a general proposition, that the State has the power to treat shares in a corporation as distinct and separate property in the hands of the holders, should it desire to do so, for purposes of taxation; and further, if suitable legislation is enacted, it may carry out this purpose. This is supported by abundant authority, and is not questioned, as I understand, by counsel for the complainants in this case. Cook on Stock and Stockholders, sec. 563; Tennessee *v.* Whitworth, 117 U. S. 129.

Conceding this to be true, however, the real contention of counsel for complainants here is that the State of Georgia has not adopted this policy, and that the action of the comptroller general in attempting to tax these shares is without authority of law.

In endeavoring to ascertain what the law of Georgia is on this subject it may be remarked first, that there is no express legislation contained in the body of statute laws of this State either in the code or subsequent to its adoption, which authorizes the collection 15 of this tax. Reference will be made, hereafter to what is contained in the tax act adopted by the legislature of Georgia in 1898, levying taxes for the years 1899 and 1900, under which act the authority to collect the taxes in question here is claimed.

It being true that there is no such express legislation, *and* it will be important to ascertain what the rule or policy of the State otherwise has been, and this seems to be stated in a decision by the supreme court of the State in the case of Wright, comptroller general *v.* Southwestern Railroad Co., 64 Ga. 783. In the opinion in that case by Jackson, justice, it is said, with reference to an effort of the State to tax the Southwestern Railroad Company, that,

"Stock in the company's own road, held by itself, or in other roads in this State, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; and stock held by the company in railroads without the limits of this State is not taxable here. Stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

What the court meant to say in the foregoing paragraph is emphasized by the immediately succeeding language, as follows: "But bonds, notes, and all other mere evidences of debt, follow the situs of the creditor, no matter where the debtor lives."

It is said that what has been quoted is a mere dictum and should not be regarded as authority. There does not appear to be good reason for this claim. The question must have been directly involved or there would have been no reason whatever for the court to express any opinion on the subject. There must have been an effort on the part of the comptroller general to tax, as a part of the property of the Southwestern Railroad Company, shares held by it in

railroads without the limits of the State, in order to have justified any reference to the matter.

It is also — that this was a decision on an appeal from the grant of an injunction *pendente lite*, and was not a final decision in the case. In the concluding paragraph of the opinion this is said:

"The judgment granting the writ of injunction until the hearing is therefore affirmed, and it is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and the law as indicated above be applied to those facts, subject to be modified by the chancellor as facts other than those in this record may require."

16 It is evident from this that the supreme court was stating the law of the case, and that the duty of the court below was to apply that law, as thus announced, to the facts, which facts, it is indicated, might be subject to modification. No suggestion was made that there might be any change in the law as stated by the court.

It is claimed, however, that the decision above referred to was made under the constitution of 1868, and that according to the decision of the supreme court of the State in Atlanta National Building & Loan Ass'n *et al. v.* Stewart, tax collector, 109 Ga. 80, a distinction is drawn in the rule as to taxation under the constitution of 1868, and that under the constitution of 1877. The first two head notes of that case are as follows:

"1. The constitution of 1868 provides that 'taxation on property shall be ad valorem only, and uniform on all species of property taxed.' As long as that constitution was in force the General Assembly had power to exempt one species of property and tax another, and this exemption could be either express or result from a failure to provide that a given species of property should be taxed.

"2. The constitution of 1877 provides that 'all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to *the* taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' Under this constitution the General Assembly can not lawfully either expressly exempt from taxation, or accomplish this result by a failure to tax, any property except that which in the constitution itself the General Assembly is expressly authorized to exempt."

What is thus stated in the head notes, and more elaborately in the opinion, is beside the exact question involved here, which is, whether the State, for purposes of taxation, treats the shares in a railroad corporation as property distinct and separate from that of the corporation which it represents. Unquestionably the effect of the decision of the supreme court of the State in Wright, comptroller general *v.* Southwestern R. R. Co., *supra.*, is that the State does not so regard shares of stock in railroad corporations located without the State. It holds that "stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

Neither do I understand the 14th head note to the opinion in Building & Loan Ass'n *v.* Stewart to be important, or in any way controlling in this case. It is as follows:

17 "The General Assembly has power to levy a tax upon the shares of stock of an incorporated company as the property of the shareholders, and also a tax upon the property of the corporation."

The power, as has been stated, may be conceded; the question is whether the State has exercised it. The following language from the opinion will throw some light upon what in this respect, was really determined:

"Possibly it may be competent to provide against taxing the shares of stock where all the property which gives them value has been taxed. I do not decide as to this because it is not before me directly. But in this case, the act provides in terms, not for relieving shareholders against what might be claimed to be double taxation, if the company had paid on everything conferring value on the shares; but on the contrary, it provides for the company to pay only on the market value, not of its property, but of shares belonging to certain of its stockholders on which no loans have been made. It is exactly a reverse proceeding. Suppose it be true that, if all the property which gives shares of stock a valuation has been paid upon, it is equivalent to paying on the shares and the owners need not pay again, or at least that the legislature may provide that they need not pay again, the provision of this act is that if the company will pay on the market value of the shares of some of its stockholders, it need not pay on any of its property."

There is nothing whatever in this decision to the effect that the State treats shares of stock in corporations as separate and distinct from that of the corporations for purposes of taxation, when the corporation itself is taxed on the property which the shares represent.

It is claimed, however, that the act of the legislature of Georgia levying taxes for the years 1899 and 1900, (Acts of 1898, p. 21), by its provisions authorizes and requires the collection of the taxes on the shares in question.

In the 16th section of this tax act it is provided that,

"In addition to the questions now propounded to taxpayers by the tax receivers, questions shall be framed by the comptroller general to reach all property upon which a tax is imposed by this act, and especially the following questions."

The 30th question is as follows:

"How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without the State?"

"31st. What was the gross nominal value thereof?"

"32nd. What was the fair market value thereof?"

18 "33rd. How many shares of stock did you own, on the day fixed for the return of property for taxation, issued by corpo-

rations within the State, the capital stock of which or the property of which is not returned by such corporation for taxation ?"

"34th. What was the gross par value thereof?"

"35th. What was the fair market value thereof?"

Are these questions in effect such an express legislative enactment as directs a tax levy on shares of the character in question? There should be a reasonably clear expression of legislative intent. Indeed if this is to be construed as double taxation, the legislative intent should be unmistakable. In Tennessee *v.* Whitworth, 117 U. S. 129, in the opinion by Mr. Chief Justice Waite, it is said:

"In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do it is because the legislature has unmistakably (*unmistakably*) so enacted. All presumptions are against such an imposition.

See also Desty on Taxation, p. 199 (sec. 39); Cool-y on Taxation, p. 165.

But whether this be strictly double taxation or not, as it is levied by different States, still there should certainly be a clear legislative expression that railroad shares are property for taxation in Georgia, in view of the distinct utterance by the Supreme Court to the contrary in Wright *vs.* Southwestern R. R. Co., *supra.*

It is admitted by the comptroller-general in the agreed statement of facts in this case, that "stockholders in the Atlanta & West Point Railroad Company, the Georgia Railroad & Banking Company, the Augusta & Savannah Railroad Company and all corporations which pay taxes upon their property to the State of Georgia, do not return their shares of stock for taxation."

19 Shares of stock owned by citizens of Georgia, in railroads within the State of Georgia, can certainly with as much justice be classed as separate and distinct property in the hands of the holders of such shares, as can the shares in railroad corporations without the State of George. It would seem that if the doctrine in the case of Building & Loan Ass'n *vs.* Stewart, *supra*, is to be applied as contended for, that it would necessarily embrace shares in domestic corporations, as well as shares in foreign corporations. If both are property, then under the construction of the constitution of 1877 announced in that case, both are subject to taxation, neither being expressly exempted by the constitution; and yet it is conceded by

counsel for the comptroller-general that the State has not attempted to tax shares in domestic corporations and that it would be wrong for it to do so.

Under the Georgia law, where the tax is sought to be collected without legal authority, an injunction is the proper remedy. Wright, comptroller-general, *vs.* Southwestern R. R. Co., 64 Ga. 783–801; S. F. & W. R. Co. *vs.* Morton, 71 Ga. 24–30; Wright, comptroller-general, *vs.* R. R. Co., 85 Ga. 649–650; Sheibley *vs.* Rome, 107 Ga. 384.

The same relief may be granted in the United States court as in a State court, if the citizenship is proper.

A part of the agreed statement of facts in this case is as follows: "It is further agreed that it is provided by the terms of said lease that whatever taxes are collectable from said stock during the entire term of said lease, Exhibit "A," are payable by the lessees thereunder, or if the same are lawfully collected from said Georgia Railroad & Banking Company that said lessees are liable to reimburse the same to said Georgia Railroad & Banking Company without in any way diminishing the rental which is payable by said lessees under said lease."

Under the facts stated, a case is made for equitable relief, and complainants are entitled to a decree as prayed.

This April 7th, 1902.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office, 7 day of Ap'l, 1902.

O. C. FULLER, *Clerk*,
By J. D. STEWARD, *Deputy.*

20 *Final Decree.*

In the Circuit Court of the United States for the Northern District of Georgia.

THE LOUISVILLE & NASHVILLE RAILROAD Company and Atlantic Coast Line Company
vs.
WILLIAM A. WRIGHT, Comptroller General, *et al.*
} No. 1133. In Equity.

This case having been submitted upon the pleadings therein and agreed statement of facts, and now coming on for final decree:

It is thereupon considered, ordered and decreed by the court that the facts in said case are, and are hereby adjudged to be as the same are set out and found in the opinion of the court filed in this case on the 7th day of April, 1902.

It is further considered, ordered and adjudged that under the laws

of the State of Georgia and the decisions of its courts, shares of railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia.

It is further ordered and adjudged that the said William A. Wright, comptroller general, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as comptroller general so to do, and he is hereby perpetually enjoined from issuing any execution or taking any steps to collect said taxes upon said shares of stock, and that the said Georgia Railroad & Banking Company is enjoined from making any return of said shares of stock for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing liability of said shares of stock to be taxed.

In open court this 16th day of April, A. D. 1902.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office April 16, 1902.

O. C. FULLER, *Clerk.*

21 *Notice to Join in Appeal.*

In the Circuit Court of the United States for the Northern District of Georgia.

THE LOUISVILLE & NASHVILLE RAILROAD Company and The Atlantic Coast Line Railroad Company
vs.
WILLIAM A. WRIGHT, Comptroller General; Georgia Railroad & Banking Company.
} No. 1133. In Equity.

Bill for injunction.

To the Georgia Railroad & Banking Company:

A decree having been entered in the above stated case against the defendants and William A. Wright, comptroller general, one of the defendants desiring to appeal to the circuit court of appeals, you as a co-defendant therein are hereby respectfully notified to appear and join in the appeal.

Very respectfully,

J. M. TERRELL,
BOYKIN WRIGHT,
Solicitors for William A. Wright, Comp. Gen.

Due and legal service of above notice in writing acknowledged and this defendant hereby refuses to join in said appeal, being content with the decree rendered in said cause.

THE GEORGIA RAILROAD & B'K'G CO.,
By JACOB PHINIZY, *Pres.*

It appearing to the court that the Ga. R. & Banking Company refuses to join in said appeal: Ordered that defendant, W. A. Wright, comptroller gen'l, be permitted and he is hereby allowed to make said appeal alone.

This Ap'l 23, '02.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office 23 day of Ap'l, 1902.

O. C. FULLER, *Clerk*,
By J. D. STEWARD, *Deputy.*

22 *Stipulation of Counsel.*

In the Circuit Court of the United States for the Northern District of Georgia.

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY *vs.* WILLIAM A. WRIGHT, Comptroller General, *et al.*	No. 1133. In Equity.

It is stipulated by counsel for the several parties in the above stated cause that, whereas, the agreed statement of facts entered into therein is fully set out in the opinion of the court filed in said cause, in making up the record in said cause on appeal in the circuit court of appeals, the clerk need not copy said agreed statement of facts, but the same as set out in the opinion of the court shall be taken for such agreed statement of facts and referred to as such.

This April 23rd, 1902.

BOYKIN WRIGHT,
J. M. TERRELL,
Solicitors for Wright, Comptroller Gen'l, Appellant.
JOS. B. & BRYAN CUMMONG,
KING & SPALDING,
Solicitors for Complainants, Appellees.

Filed in clerk's office 23 day of Ap'l, 1902.

O. C. FULLER, *Clerk*,
By J. D. STEWARD, *Deputy.*

"A."

Lease.

The Georgia Railroad and Banking Company
to
William M. Wadley.

GEORGIA:

This indenture, made this seventh day of May, anno Domini, one thousand eight hundred and eighty-one, between The Georgia Railroad and Banking Company, a corporation under the laws of said State, party of the first part, and Wm. M. Wadley, of Monroe county, in said State, party of the second part, witnesseth: That the party of the first part, in conformity with the provisions of its charter, and acting in this behalf in pursuance of a resolution of its board
23 of directors, regularly convened the twelfth day of April in the year one thousand eight hundred and eighty-one, for and in consideration of the covenants, conditions and agreements hereinafter set forth on the part of said party of the second part:

Hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns, for the full term of ninety-nine years from the first day of April, one thousand eight hundred and eighty-one.

All its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has or enjoys, or is now entitled to have or enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties, imposed by its charter in this behalf upon the party of the first part.

And the party of the first part has also rented and farmed out, and does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means of the full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to-wit:

The Georgia railroad from Augusta to Atlanta, and its branches, viz: The branch from Barnett to Washington; the branch from Camak to Warrenton, and the branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points;

Also, the Macon and Augusta railroad, from Warrenton to Macon;

Together with the rights of ways, road-beds, depots, stations, warehouses, elevators, work shops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches.

And the party of the first part also hereby assigns to the party of the second part, so far as it can lawfully do so, any right it may have to extend any of said railroads or branches.

And the party of the first part also assigns to the party of the second part and his assigns, all its rights, claims, interest and demand, in, to and upon the Walton railroad, so that the party of the second part may have the same right touching the bonds of the
24 Walton Railroad Company that he has by virtue of these presents in reference to the bonds of the Augusta and Port Royal railway, as hereinafter provided.

And the party of the first part also assigns by these presents to the party of the second part and his assigns, all the rights of ownership, management, control and use of the Western Railroad of Alabama, which the party of the first part now has or is entitled to; provided, that when either branch of the Western Railroad of Alabama from Opelika into Georgia shall be sold, one-half of the proceeds of the sales shall be received by the party of the first part.

But in consideration that the party of the second part and his assigns will thereby lose the free use of the property of the party of the first part in the branch so sold, the party of the first part will in that event pay to the party of the second part and his assigns interest on said half of the proceeds at the same rate that the then bonds of the Western Railroad of Alabama, or its successor, may bear at the date of payment of the interest of said bonds. That is to say, if said bond- shall bear eight per cent. interest, that rate of interest shall be paid on one-half of the proceeds, and if said bonds bear six per cent. interest, then that rate of interest shall be paid on one-half the proceeds, and so from time to time.

The party of the first part also agrees to assign and transfer to the party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock now held by the party of the first part in the Atlanta and West Point Railroad Company, to-wit: four thousand four hundred and nine shares; and in the Rome Railroad Company, to-wit: fourteen hundred and eighty-nine shares and three-eighths of a share;

Also, to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks, with the restrictions hereinafter indicated, as fully as party of the first part might vote them if this agreement had not been made;

Also, to assign and transfer to said party of the second part and his assigns, for and during said term of ninety-nine years, the income of the stock and the bonds held by the party of the first part in the Port Royal and Augusta Railway Company, and to give to the party of the second part and his assigns an irrevocable power of attorney to vote said stocks and bonds, with the restriction hereinafter indicated, as fully as the party of the first part could vote them if this agreement had not been made.

But this provision is not to include the claim of the party
25 of the first part on the Compress Company of Port Royal, its compress, elevator, and other property of said Compress Company.

And if the said bonds of the Port Royal and Augusta Railway Company should be collected at any time by the party of the first part, then the party of the first part will pay to the party of the second part and his assigns interest on said collections for and during the unexpired period of said term of ninety-nine years, at the then current legal rate of interest of the State of Georgia, not exceeding six per cent. per annum.

The party of the first part also agrees to deliver to the party of the second part and his assigns all steel rails which have been contracted for by the party of the first part, at the expense of the party of the first part.

The party of the first part also agrees to pay the principal and interest of the bonds of the party of the first part, and of the Macon and Augusta Railroad Company; provided, that nothing herein contained shall be construed as impairing or in any way affecting the right of the party of the first part to renew any of said bonds.

And the party of the first part also agrees to pay the taxes, which may be payable under the charter of the party of the first part, on the rental hereinafter stipulated, or on so much thereof as may be taxable, and all taxes, if any, which may become by law collectible from the party of the first part on the shares of its stock in the hands of its shareholders. But all other taxes, which, may be payable on the property and franchises, which or the control, use or enjoyment of which is hereby rented, farmed out, assigned or transferred to the party of the second part and his assigns, shall be paid by the party of the second part and his assigns.

This indenture is not to affect the ownership, use or enjoyment of the party of the first part, as to all the cash, notes, claims, demands, rights and credits, owned by the party of the first part on the first day of April, eighteen hundred and eighty-one.

The banking house, banking privileges and banking business of the party of the first part are no wise affected by this indenture.

The lands, houses, and tenements belonging to the party of the first part, other than its elevator and appurtenances in the city of Augusta, not necessary or used for railroad purposes, are not affected by this indenture, and contracts relating to such houses, lands and tenements made before the date of the presents, although not yet executed, shall not be affected by this agreement, but may be carried out by the party of the first part.

26 All contracts now existing between the party of the first part and other railroad companies, except as otherwise and hereinbefore provided, shall be carried out by the party of the second part and his assigns; provided, that the party of the second part and his assigns shall have the same right to modify, change or abrogate said contracts, which the party of the first part now has.

In consideration of the things hereinbefore agreed to be done by the party of the first part, the party of the second part hereby covenants for himself and his assigns to pay to the party of the first part the sum of six hundred thousand dollars annually, for the full term of ninety-nine years, in two semi-annual payments of three

hundred thousand dollars each, the first of said semi-annual payments to be made on the first day of October, eighteen hundred and eighty-one, and the others on the first days of April and October thereafter, and said payments to be made in such money as is legal tender of the United States at the times of such payment.

The party of the second part also covenants for himself and his assigns to return the property hereinbefore rented, farmed out and assigned to the party of the second part in as good condition as it is now in, and unimpaired in value, that is to say, the railroads and their appurtenances as well adapted to the business of transportation as they now are, and the personal property in personal property equal in value and as well adapted to its uses as it now is. And all the property substituted for and added to that which is hereby rented and farmed out, shall be the property of the party of the first part, to the same extent as the original property, for which it may be substituted, or to which it may be added, was the property of the party of the first part.

And the party of the second part also covenants for himself and his assigns, to keep the railroads and their appurtenances and the means of transportation in first-class condition of such property, and also to indemnify the party of the first part against any damages, losses or liabilities, which may be incurred by reason of the operating of the railroads, the use and control of which are hereby granted and farmed out.

The party of the second part also covenants for himself and his assigns that he and they will pay the interest demandable of the party of the first part on the bonded debt of the Western Railroad of Alabama, so that said indebtedness shall never be increased; and at the termination for any cause of this agreement, to return the property, which the party of the first part has in said railroad, without any greater encumbrance thereon than it now bears.

27 But the party of the first part will consent to the organization of the owners of the Western Railroad of Alabama into a corporation, and to the issue by said corporation of bonds to renew bonds maturing from time to time, for which the said Railroad of Alabama is liable, which said bonds the party of the first part hereby agrees to endorse or guarantee to the same extent that it is now bound for the bonds of the Western Railroad of Alabama; provided, that said incorporation shall not impair the beneficial ownership of said railroad by the party of the first part; and,

Provided further, that the aggregated amount of bonded indebtedness of said railroad and the rate of interest thereon shall not be increased to an amount and rate exceeding the present amount of bonds and present rate of interest.

The party of the second part also covenants for himself and his assigns, that the privileges of free passage to the stockholders and directors of the Georgia Railroad and Banking Company shall be continued to the same extent as they are now enjoyed by stockholders and directors respectively, according to the present usages of said company.

The party of the second part also covenants for himself and his assist in encumbering, or permit to be encumbered, the property or assigns that he and they shall have no power to encumber, or to stocks passing into the control of the party of the second part by virtue of this indenture to the full extent that the said party has control, except the Western Railroad of Alabama, as hereinbefore provided, and that he and they will not for such purpose vote any of the stocks or bonds of the corporations the power of voting which is hereby given, and that the irrevocable powers of attorney hereinbefore stipulated to be given may be restricted on their face in this respect.

The party of the second part also covenants for himself and his assigns that the party of the first part shall have the right to enter upon and inspect the railroads hereinbefore mentioned, and appurtenances, including the rolling stock used on the same, by persons selected by the party of the first part, as often as the party of the first part may think proper.

The party of the first part reserves the right, in addition to all other remedies now usual or hereinafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this indenture.

At the termination for any cause of this lease, all necessary and proper betterments which shall have been made by the party
28 of the second part or his assigns, shall be paid for at their then fair value by the party of the first part.

Provided always, that nothing herein contained shall be construed as giving or attempting to give to the party of the second part or his assigns the right to do or omit any act or thing, the doing or omission of which would furnish a ground for forfeiture of the charter of the party of the first part, and all such acts and omissions are hereby declared to be contrary to the terms and spirit of this indenture, and void.

In order to guarantee the performance of the agreements and covenants hereinbefore made by the party of the second part, said party of the second part further covenants for himself and his assigns to deposit in such place and in such manner as the president of the party of the first part may designate, one million dollars in bonds of the United States or in other bonds of equal value—said deposit to be kept up to the clear market value of one million dollars; provided, the party of the second part and his assigns shall have the privilege of collecting for his or their own benefit the income of said bonds and of changing the kind of bonds from time to time, and of substituting for bonds other and different security; provided, such other and different security be first approved by the party of the first part.

And the party of the second part also covenants for himself and his assigns that his and their legal rights and privileges under this indenture shall be so preserved by him that the deposit of one million dollars of security for the due and faithful performance of

FOLD OUT IS TOO LARGE TO BE FILMED

TAX RETURN

—OF—

the terms and conditions of this indenture shall remain and continue so subject during the entire term of the lease without impediment or embarrassment growing out of distribution, or want of representation of the *state* of the party of the second part or of any of his assigns; and that it is the true intent and meaning of these presents that said deposit of security shall at all times remain as a guaranty for the covenants of this indenture, and liable to any proceedings at law or in equity to enforce the rights of the party of the first part without let, hindrance of delay on account of the death of the party of the second part, or any of his assigns, testate or intestate, and that death of the party of the second part or any of his assigns, testate or intestate, and the failure of legal representation of his or their estate for any period whatsoever, shall be no excuse for the non-performance of any of the covenants or agreements of the party of the second part.

It is agreed that within sixty days from the date of these presents, a full and complete inventory of all the property delivered
29 under this agreement, showing its character, condition and value, shall be made by two disinterested experts and annexed to this indenture as a part thereof—said inventory to be made at the joint expense of the parties of the first and second parts.

In witness whereof, the party of the first part has caused its president to sign these presents and its corporate seal to be affixed hereunto, and the party of the second part has hereunto set his hand and seal the day and year first above written.

In duplicate.

THE GEORGIA R. R. & BANKING CO.,
[CORPORATE SEAL.]
By C. H. PHINIZY, *President.*
WM. M. WADLEY. [L. S.]

Signed, sealed and delivered in the presence of:

A. R. LAWTON.
JOS. B. CUMMING.
HENRY C. GOODRICH,
Notary Public, Richmond County, Ga.

GEORGIA,
Richmond County,

Recorded in clerk's office, superior court of said county, Book KKK, folios 711, 712, 713, 714, 715, and 716, May 26th, 1881.

WM. E. KEENER,
Deputy Clerk Superior Court, Richmond Co., Ga.

30 ("Annual return for taxation," in blank.)

31 *Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Georgia.

THE LOUISVILLE & NASHVILLE RAILROAD Co. and The Atlantic Coast Line Railroad Co.
vs.
WILLIAM A. WRIGHT, Comptroller-General.
} In Equity. No. 1133.

Bill for injunction.

The above named defendant, William A. Wright, comptroller-general, conceiving himself aggrieved by the decree made and entered on April 16th, 1902, in the above entitled case, does hereby appeal from said order and decree to the United States circuit court of appeals, for the fifth circuit, at New Orleans, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the fifth circuit, at New Orleans.

J. M. TERRELL &
BOYKIN WRIGHT,
Solicitors for Appellants.

Dated 17th Ap'l, 1902.

The foregoing claim of appeal is allowed.

WM. T. NEWMAN, *U. S. Judge.*

Dated April 17th, 1902.

Filed in clerk's office Apr. 21, 1902.

O. C. FULLER, *Clerk.*

32 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Georgia.

THE LOUISVILLE & NASHVILLE RAILROAD Company and The Atlantic Coast Line Railroad Company
vs.
WILLIAM A. WRIGHT, Comptroller-General, Georgia Railroad & Banking Company.
} In Equity. No. 1133.

Assignment of errors on appeal.

And now on the 17th day of April, 1902, comes William A. Wright, comptroller-general, by Joseph M. Terrell and Boykin Wright, his solicitors, who appeal from the decree in the above stated cause entered April 16th, 1902, and with his appeal this day allowed, file the following assignment of errors, to-wit:

First. That the court erred in not sustaining defendants' demurrer to the bill, set up by way of answer, and dismissing the said bill, because

(*a.*) The complainants did not make such a case as entitled them in a court of equity to any relief from or against the defendants touching the matters contained in said bill, or any of such matters.

(*b.*) Because there was no equity in said bill.

(*c.*) Because complainants had no such interest in the matters complained of as to entitle them to maintain said bill, and to entitle them to relief by injunction.

Second. Because the court erred in granting the injunction against William A. Wright, comptroller-general, perpetually enjoining him from issuing any execution or taking any steps to collect taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Third. Because the court erred in granting the injunction against the Georgia Railroad & Banking Company, enjoining it from making any return of the shares of stock of the Western Railway of Alabama held by it, in the State of Georgia, for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed in the State of Georgia.

Fourth. Because the court erred in holding and decreeing, under the facts and circumstances of the case, that "under the laws of the State of Georgia, and the decisions of its courts, shares of
33 railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia," and in not holding and decreeing to the contrary.

Fifth. Because the court erred, under the facts and circumstances of the case, in holding and decreeing "that the said William A. Wright, comptroller-general, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as comptroller-general so to do," and in not holding and decreeing to the contrary.

Wherefore, the said William A. Wright prays that the said decree be reversed, and that the said court be directed to enter a decree dissolving said injunction.

J. M. TERRELL &
BOYKIN WRIGHT,
Solicitors for Appellants.

Let this assignment of errors be filed with the appeal above allowed. This 17 day of April, 1902.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office Apr. 21, 1902.

O. C. FULLER, *Clerk.*

Bond.

Know all men by these presents, that we, William A. Wright, as principal, and Philip Cook, as surety, are held and firmly bound unto the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company in the full and just sum of two hundred and fifty dollars to be paid to the said companies, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of April, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States, for the northern district of Georgia, in a suit depending in said court between The Louisville & Nashville Railroad Company and The Atlantic Coast Line Railroad Company, complainants, and
34 William A. Wright, defendant, a decree was rendered against the said William A. Wright and the said William A. Wright having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company citing and admonishing them to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said William A. Wright shall prosecute said appeal to effect, and answer

all damages and cost, if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM A. WRIGHT. [SEAL.]
PHILIP COOK. [SEAL.]

Sealed and delivered in the presence of:
J. D. MASSEY,
[SEAL.] *Notary Public, Fulton Co., Ga.*

Approved by
WM. T. NEWMAN,
U. S. Judge.

UNITED STATES OF AMERICA,
Northern District of Georgia.

I, Philip Cook, security on the within bond, being duly sworn, deposes and says that he is worth the sum of $2,000.00 over and above his just debts and liabilities and exemptions under the homestead and exemption laws of the State of Georgia.

PHILIP COOK.

Sworn to and subscribed before me this 21st day of April, 1902.
J. D. MASSEY,
Notary Public, Fulton Co., Ga.

Filed in clerk's office April 21st, 1902.
O. C. FULLER, *Clerk.*

35 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the western district of Georgia, wherein William A. Wright is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of April, in the year of our Lord one thousand nine hundred and two.

WM. T. NEWMAN,
U. S. Judge.

We hereby this 19th day of April, 1902, accept due personal service of this citation on behalf of The Louisville & Nashville Railroad Company and The Atlantic Coast Line Railroad Company, appellees.

JOS. B. & BRYAN CUMMING,
KING & SPALDING,
Solicitors for Complainants.

The Georgia Railroad & Banking Company, one of the defendants in the above stated case, having been notified and requested in writing, by its co-defendant, William A. Wright, comptroller general, to join in the appeal to the circuit court of appeals, which the said Wright has petitioned for, and refusing to do so, being content with said decree, does hereby acknowledge due and legal service of a copy of the within citation, and waives all further service or notice in said appeal.

April 19th, 1902.

THE GEORGIA RAILROAD & B'K'G CO.,
By JACOB PHINIZY, *Pres.*

Filed in clerk's office Apr. 21, 1902.

O. C. FULLER, *Clerk.*

36 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, Northern District of Georgia.

I, O. C. Fuller, clerk of the circuit court of the United States for the northern district of Georgia, do hereby certify that the foregoing and attached 45 pages of printing and writing contain a true copy of the record as stipulated by counsel, assignments of errors and all proceedings in the case wherein The Louisville and Nashville Railroad Company and The Atlantic Coast Line Railroad Company were complainants, and William A. Wright, comptroller general of the State of Georgia and The Georgia Railroad and Banking Company were defendants, as the same appear of record and on file in the clerk's office of the said court.

In testimony whereof, I hereunto set my hand and the seal of the said court, at Atlanta, Ga., this the 25th day of April, 1902.

[SEAL.]

O. C. FULLER,
Clerk Circuit Court of the United States for the Northern District of Georgia.

37 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901, May 26, 1902.

(Extract from Minutes.)

WILLIAM A. WRIGHT, Comptroller General,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY. } No. 1156.

This cause was regularly called this day and submitted to the court after argument by Mr. Boykin Wright and Mr. J. M. Terrell for appellant, and by Mr. Jos. B. Cumming and Mr. Alex. C. King for appellee.

October Term, 1902, Oct. 13, 1902.

(Extract from Minutes.)

WILLIAM A. WRIGHT, Comptroller General,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. } No. 1156.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Georgia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause, be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the appellant, William A. Wright, and the surety on the appeal bond herein, Philip Cook, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

Oct. 13th, 1902.

38 Original filed 13 day of Octo., 1902.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals, Fifth Circuit, October Term, 1902.

WILLIAM A. WRIGHT, Comptroller General, Appellant,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellees. } No. 1156.

Appeal from the United States circuit court, northern district of Georgia.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: The decree of the circuit court is affirmed.

39 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 39 pages, numbered from *a* to 38 inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, in the case of—

WILLIAM A. WRIGHT, Comptroller General,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL. } No. 1156.

as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 29th day of January, A. D. 1903.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

40 In the Circuit Court of Appeals for Fifth Circuit.

WILLIAM A. WRIGHT, Comptroller General, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD Co. and ATLANTIC Coast Line Railroad Company, Appellees. } Appeal.

Whereas a certified transcript of the record and all proceedings in the above stated case had in the United States circuit court of appeals for the fifth circuit, was duly filed in the Supreme Court of the United States, accompanying a petition for writ of certiorari

presented by William A. Wright, comptroller general, in said cause, and is now of file in that court;

And whereas the said writ was on the 24th day of March, 1903, granted, commanding the judges of the said circuit court of appeals to send without delay to the Supreme Court the record and proceedings in said cause for review and determination:

Now, therefore, it is hereby stipulated by the parties to said cause, acting through their solicitors of record, that the said certified transcript of the record and proceedings in said cause, now of file in the Supreme Court, shall be taken as a return to the writ, and that this stipulation be filed with the clerk of the United States circuit court of appeals for the fifth circuit and a certified copy thereof be sent up by him with his return to the writ.

Ap'l 1, 1903.

JOS. B. & BRYAN CUMMING,
KING, SPALDING & LITTLE,
Solicitors for L. & N. Railroad Co. and Atlantic C. S. R. R'd Co.

BOYKIN WRIGHT,
JOHN C. HART,
Solicitors for Wm. A. Wright, Comptroller General of Georgia.

The foregoing has the following endorsements, to-wit:

No. 1156. In the United States circuit court of appeals for the fifth circuit. William A. Wright, comptroller general, appellant, *v.* Louisville & Nashville Railroad Co., *et al.* Stipulation *in re* return to writ of certiorari. Filed 3 day of April, 1903, Charles H. Lednum, clerk of the United States circuit court of appeals.

41 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing is a true copy of the stipulation *in re* return to writ of certiorari, in the case of William A. Wright, comptroller-general, *vs.* Louisville & Nashville Railroad Co., *et al.*, No. 1156, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, Louisiana, this 3rd day of April, A. D. 1903.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

42 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which William A. Wright, comptroller general, is appellant, and The Louisville & Nashville Railroad Company and The Atlantic Coast Line Railroad Company are appellees which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the northern district of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
43 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of March, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

44 [Endorsed:] File No. 18,864. Supreme Court of the United States. No. 636, October term, 1902. William A. Wright, comptroller general, *vs.* The Louisville & Nashville R. R. Co., *et al.* Writ of certiorari.

In the United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of said court, do hereby certify that I received the within writ on the 3rd day of April, A. D. 1903, and, whereas, the attorneys for the parties therein named have, by a stipulation in writing filed in my office on this day, agreed: "That the said certified transcript of the record and proceedings in said cause, now of file in the supreme court, shall be taken as a return to the writ, and that this stipulation be filed with the clerk of the United States circuit court of appeals for the fifth circuit and a certified copy thereof be sent up by him with his return to the writ." Therefore, in compliance with said writ, and by direction of the judges of this court, I have made and attached hereto a certified copy of said stipulation as a return to the within writ.

Witness my official signature amd the seal of said court, this the 3rd day of April, A. D. 1903.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM, *Clerk.*

45 [Endorsed:] File No. 18,864. Supreme Court U. S., October term, 1903. Term No. 234. Wm. A. Wright, compt'r general, petitioner, *vs.* The Louisville & Nashville R. R. Co. Writ of certiorari & return. Filed April 8", 1903.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 636

WILLIAM A. WRIGHT, COMPTROLLER GENERAL,
PETITIONER,

v.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BOYKIN WRIGHT AND
JOHN G. HART,
Attorney General of Georgia,
Counsel for the Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1908

Supreme Court of the United States

OCTOBER TERM, 1902.

EX PARTE WILLIAM A. WRIGHT, COMPTROLLER GENERAL, PETITIONER.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Fifth Circuit to Certify to the Supreme Court, for Its Review and Determination, the Case of William A. Wright, Comptroller General, Appellant, vs. The Louisville and Nashville Railroad Company and The Atlantic Coast Line Railroad Company, Appellees, Being No. 1156 in that Court.

To the Honorable the Supreme Court of the United States:

The petition of William A. Wright respectfully shows to this honorable court as follows:

1. Your petitioner is a citizen of and is the comptroller general of the State of Georgia, and resides in the city of Atlanta, in said State.

2. The Louisville and Nashville Railroad Company is a corporation created and existing under the laws of the State of Kentucky and is a citizen of that State, with its principal

office in the city of Louisville, in said State, and the Atlantic Coast Line Railroad Company is a corporation created and existing under the laws of the State of Virginia and is a citizen of that State, with its principal office in the city of Petersburg, in said State; that the Georgia Railroad and Banking Company is a corporation created and existing under the laws of the State of Georgia, with its principal office in the city of Augusta, in said State.

3. That heretofore, to wit, on the 22d day of August, 1901, the said Louisville and Nashville Railroad Company and the said Atlantic Coast Line Railroad Company filed their bill in equity against William A. Wright, comptroller general, to enjoin the latter from collecting from the Georgia Railroad and Banking Company State taxes on certain shares of stock in the Western Railway of Alabama, complainants being at the time of the bringing of said suit the lessees of the said Georgia railroad and liable under the terms of the lease for taxes assessed against the lessor. The lease was for ninety-nine years from the first day of April, 1881. Among the properties leased by the Georgia Railroad and Banking Company was its interest in the Western Railway of Alabama, which at the time of the lease was jointly owned by the Georgia Railroad and Banking Company and the Central Railroad and Banking Company as tenants in common, each of said companies owning one-half undivided interest therein. (For copy of said lease, see certified Record, page 22, marked "A.")

4. Subsequent to the lease the owners of the Western Railway of Alabama, viz., the Georgia Railroad and Banking

Company and the Central Railroad and Banking Company. had the same incorporated under the laws of Alabama, as provided for in the lease, with a capitalization of $3,000,000, divided into 30,000 shares of stock, fifteen thousand to the Georgia Railroad and Banking Company and 15,000 to the Central Railroad and Banking Company. These 15,000 shares of stock have been held ever since, and are still held by the Georgia Railroad and Banking Company in the State of Georgia, the income of which, however, is paid over annually to the lessees. The Georgia Railroad and Banking Company executed to the lessees a power of attorney to vote said stock at the stockholders' meeting.

These 15,000 shares of stock are the property which the comptroller general claims is subject to taxation. The object of the bill was to enjoin the collection of this tax on the ground that there is no law authorizing the taxation of shares of stock held by a resident owner in a foreign corporation. Complainants as lessees of the Georgia Railroad and Banking Company, entitled to the income from said shares of stock, and liable under the lease contract for the taxes, if any, due thereon, brought their bill in the United States circuit court for the northern district of Georgia to enjoin the collection of said taxes.

5. There being no controversy as to the facts, there were presented to the court but two questions:

(1.) Did the complainants have such interest in the matter complained of as to entitle them to maintain said bill, and such equity as to entitle them to relief by injunction?

(2.) Are the said shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia

Railroad and Banking Company, a Georgia corporation, taxable as property of the latter company by the State of Georgia?

6. Judge Newman, presiding in the circuit court, decided both of these questions in favor of the railroads, and granted an injunction against the comptroller general, enjoining him from issuing any execution or taking any steps to collect the taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad and Banking Company in the State of Georgia.

7. Judge Newman in his opinion stated the issue as follows:

"It may be conceded, first, as a general proposition, that the State has the power to treat shares in a corporation as distinct and separate property in the hands of the holders, should it desire to do so, for purpose of taxation; and further, if suitable legislation is enacted, it may carry out this purpose. This is supported by abundant authority, and is not questioned, as I understand, by counsel for the complainants in this case.

"Cook on Stock and Stockholders, sec. 563.

"Tennessee *vs.* Whitworth, 117 U. S., 129

"Conceding this to be true, however, the real contention of counsel for complainants here is, that the State of Georgia has not adopted this policy, and that the action of the comptroller general in attempting to tax these shares is without authority of law."

8. The State excepted to this decision and appealed the same to the circuit court of appeals, and the case on appeal

was heard in New Orleans on the — day of May, 1902, the specification of errors on said appeal being as follows:

First. That the court erred in not sustaining defendant's demurrer to the bill set up by way of answer and dismissing the said bill, because:

(*a.*) The complainants did not make such a case as entitled them in a court of equity to any relief from or against the defendants touching the matters contained in said bill or any of such matters.

(*b.*) Because there was no equity in said bill.

(*c.*) Because complainants had no such interest in the matters complained of as to entitle them to maintain said bill and to entitle them to relief by injunction.

Second. Because the court erred in granting the injunction against William A. Wright, comptroller general, perpetually enjoining him from issuing any execution or taking any steps to collect taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad and Banking Company in the State of Georgia.

Third. Because the court erred in granting the injunction against the Georgia Railroad and Banking Company, enjoining it from making any return of the shares of stock of the Western Railway of Alabama held by it in the State of Georgia for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed in the State of Georgia.

Fourth. Because the court erred in holding and decreeing, under the facts and circumstances of the case, that "under the laws of the State of Georgia and the decisions of its courts, shares of railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia," and in not holding and decreeing to the contrary.

Fifth. Because the court erred, under the facts and circumstances of the case, in holding and decreeing "that the said William A. Wright, comptroller general, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as comptroller general so to do," and in not holding and decreeing to the contrary.

9. On the 13th day of October, 1902, the circuit court of appeals handed down its decision affirming Judge Newman's opinion, filing no opinion.

10. The contention of the State of Georgia is that since the constitution of 1877 all property not exempt by that constitution is taxed, and that the legislature not only has not exempted but cannot exempt any item of property not specifically mentioned as exempt in that constitution, and that inasmuch as shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself, these shares are taxable to the owner at its domicile, no matter where the property of the corporation may be located.

11. A large sum to the State is involved in this litigation, amounting to $150,000. or other large sum, besides the taxes that will continue to accrue to the State on said shares in the future, provided taxes on said shares are legally collectible by the State.

12. Your petitioner shows that the State is dissatisfied with the said judgment of the circuit court of appeals.

13. Your petitioner is advised and believes that said judgment of the United States circuit court of appeals for the fifth circuit in said case is erroneous, and that this honorable court should require the said case to be certified to it for review and determination, under and in conformity with the provision of the sixth section of the act of Congress entitled "An act to establish circuit courts of appeals, to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, petitioner presenting this his petition for certiorari within one year from the rendition of the judgment of the said circuit court of appeals and at the first term of this court thereafter, accompanying the same with a certified copy of the entire record of the said case in the circuit court of appeals, as required by rule No. 37 of this honorable court, said record being filed herewith as part of this application for certiorari and marked Exhibit "A," the said case being made final in the said circuit court of appeals by said act.

14. That the questions involved in said suit are of gravity and importance, in this:

(1.) That the said suit and decision involved the question of interference by the United States court by injunction with

the State in the collection of its revenue and deprived the State in this particular case of the sum of $150,000 or other large sum.

(2.) That said decision is in conflict with the decisions of the supreme court of Georgia interpreting that provision of the constitution of 1877, declaring what property shall be taxed and what property shall be exempt from taxation, the conflict being in this:

(*a.*) That the said decision of the circuit court of appeals for the fifth circuit holds that shares of stock in a foreign railroad are not property subject to taxation here, but mere representations or symbols of property, the only substantial property being that of the railroad company itself in the State where said railroad is located.

(*b.*) That the said decision of the circuit court of appeals in affirming the decision of the circuit court holds that the General Assembly of Georgia has the power to declare whether or not shares of stock in a foreign railroad or in any railroad shall be deemed and treated as property subject to taxation, whereas the supreme court of Georgia has distinctly held in several decisions to the contrary and declared that the legislature, since the constitution of 1877, has no power to classify subjects of taxation, but that the said constitution alone does this and forbids the legislature from undertaking to classify subjects of taxation or to exempt any property not specifically exempted by that constitution, as shown by the following authorities, to wit:

The constitution of Georgia prescribes an *ad valorem* tax on *all* property subject to taxation.

Section 5883, Georgia Code.

All property in the State divided in two classes only—that subject and that not subject to taxation.

82 Ga., 138.

84 Ga., 683.

Shares of stock in railroad companies not included in the exemptions authorized by the constitution.

Georgia Code, 5884, 5886.

Shares of stock in Georgia are personal property.

Georgia Code, sec. 3070.

"Shares of stock in railroad companies shall be *deemed personal property.*"

Sec. 2165 of the Code.

40 Ga., 408.

94 Ga., 201, 202.

109 Ga., 69–72.

Shares of stock separate property from property of corporation.

94 Ga., 201, 202.

58 Ga., 190.

95 U. S., 679.

96 U. S., 193.

109 Ga., 69–72.

The legislature has no power to classify subjects of taxation.

82/138=84/683=87/400=107/55=104/300=109/80.

113 Ga., 883, at 885.

This our constitution forbids when applied to property. The constitution alone does this.

109 Ga., 70.

The decision in 109 Ga., at 72, distinctly declares that shares do not represent the property of the corporation, and that tax on the shares is a direct tax on property, viz., the property of the shareholder and not the property of the corporation.

109 Ga., at 72 and top of page 73.

To the same effect:

109 Ga., page 80 *et seq.*

Any property which claims exemption must show express authority for said exemption.

Sturgis *vs.* Carter, 114 U. S., 511.

104 Ga., at 297.

113 Ga., 883, at 885.

74 Ga., 413.

"Taxation is the rule, and exemption the exception (74 Ga., 413). * * * Any one claiming an exemption from taxation must show an act of the General Assembly passed in pursuance of the constitution, authorizing the exemption; and in construing such an act every doubt is to be resolved in favor of taxation and against exemption."

113 Ga., at 885.

Railroad companies are required to return each "class or species of property"—all property—to be "taxed as other property of the people of this State."

Code, sec. 780.

Likewise ordinary tax-payers are required to return specifically all property, including obligations for money, etc., whether the same are within or without the State.

Code, sec. 833.

The question then resolves itself into a simple one, viz: Are railroad shares "property?" If so, and not exempt, the laws of Georgia tax them.

Code, secs. 780–833.

But the very tax act under which these taxes are claimed *expressly* requires the shares of stock in a foreign corporation to be returned for taxation by the tax-payer under oath.

Acts of 1898, page 36, sec. 16, pars. 30, 31, and 32.

Also in this very act the legislature recognizes "stocks" as *property to be taxed* in requiring "that the agent in this State, of any person, firm or corporation, resident without this State, who shall have on hand for sale, storage, or otherwise, as such agent, any merchandise or other property, including money, notes, accounts, bonds, *stocks*, etc., shall return the same for taxation to the tax receiver of the county where the same may be, to be taxed for State and county purposes as other property of the State is taxed."

Acts of 1898, page 29.

In Georgia the constitution classifies the subjects of taxation. The legislature has nothing to do with it. By the constitution all property is taxed except religious, charitable, public or educational property.

109 Ga., 68 and 70.

But if the legislative intent be considered of importance, how could that intention be made more manifest than in the said act of 1898?

Read 113 Ga., 883, at 885; 74 Ga., 413.

See also Georgia Laws of 1884 and 1885, pp. 28 and 30, as follows:

1. Section 2 of the act of 1884–'5, entitled—

"An act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes.

"SECTION 2. *Be it further enacted*, That personal property shall be construed, for purposes of taxation, to include all goods, chattels, moneys, credits and effects, whatsoever they may be, all ships, boats and vessels belonging to the inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due the person to be taxed; all stocks and securities, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt by the laws of the United States or of this State."

See Georgia Laws of 1884–'5, pages 28 and 30.

The above act of 1884–1885 is *not* a part of the general tax act of that year. It is a separate, distinct, and permanent enactment, declaratory of the general policy of the State and of the legislative intent that personal property shall be construed to include, *for purposes of taxation*, all *stock in foreign corporations* owned by citizens of this State unless exempt by the laws of the United States or of this State.

See Acts of 1884–1885, pages 28 and 30.

(3.) That the questions involved in said suit are of further gravity and importance in this, to wit:

That the said decision of the circuit court of appeals in holding that shares of stock in a corporation are not property, but mere symbols of property, is in conflict with the decisions of other circuit courts of appeals and of the Supreme Court of the United States, and for this reason this honorable court should require the said case to be certified to it for review and determination, under and in conformity with the provisions of the said sixth section of the act of Congress of March 3, 1891, the said conflict being with the decisions of this honorable court as contained in—

Sturgis *vs.* Carter, 114 U. S., 511.
3 Wall., at page 583.
136 U. S., 549 (L. ed.), 527.
70 U. S., 573, 584.
85 U. S., 206, 230.
117 U. S., 129.
119 U. S., 265.
Cleveland Trust Co. *vs.* Lander, etc., U. S. Sup. Ct., Oct. Term, 1901.

(4.) That the questions involved in said suit are of further gravity and importance in this, to wit:

That the said case was decided in the said circuit court of appeals as well as in the circuit court upon the supposed authority of the decision of the supreme court of Georgia in the case of Wright, comptroller general, *vs.* Southwestern Railroad Company, reported in 64 Ga., 783, at 799.

Judge Newman, rendering the opinion of the circuit court, conceded that the State had the power to treat shares of

stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783.

That decision is put on the theory that stock in a railroad is but so many shares of its property, simply symbols or representations of the corporate property, and is contrary to the great weight of authority defining what a share is.

Morawetz, secs. 224, 225.
69 Pa., 407.
50 Am. Rep., 131, 132.
2 Woods, 144.
1 Woods, 18.
3 Wall., 584.
18 Wall., 229, 230.
94 Ga., 202.
109 Ga., 69–72.

The said decision in 64 Ga., 783, was rendered under the constitution of 1868, when the legislature had the power to exempt from taxation any property, either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga., 80 (h. n. 1).

But by the constitution of 1877 the power to "exempt" from taxation was taken away from the legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80 (h. n. 2).

Besides, when the decision in 64 Ga. was rendered there was no law requiring shares of stock to be returned

for taxation as is now required by the tax act of 1898 and by the Acts of 1884–'5, pages 28 and 30, above quoted.

As we have seen, the decision in 109 Ga., at 72, distinctly declares that shares do not represent the property of the corporation, and that a tax on the shares are a direct tax on the property, viz., the property of the shareholder and not the property of the corporation.

109 Ga., at 72 and top of 73.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fifth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said case therein entitled William A. Wright, comptroller general, appellant, *vs.* Louisville and Nashville Railroad Company *et al.*, appellees, appealed from the United States circuit court for the northern district of Georgia, being No. 1156 in said circuit court of appeals, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and to regulate, in certain cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said circuit court of appeals in the

said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

WILLIAM A. WRIGHT,
As Comptroller General of the State of Georgia,
By his solicitors and counsel, JOHN C. HART,
Attorney General of Georgia,
BOYKIN WRIGHT.

VERIFICATION OF THE PETITION.

UNITED STATES OF AMERICA,
Northern District of Georgia, at Atlanta, Ga.

Boykin Wright, Esq., being duly sworn, says that he is one of the attorneys of counsel for William A. Wright, comptroller general, the petitioner above named, and as such had in part personal charge for him of the case in the foregoing petition mentioned in the circuit court of the United States for the northern district of Georgia, and in the United States circuit court of appeals for the fifth circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

BOYKIN WRIGHT.

Sworn to and subscribed before me this 2d day of February, 1903.

GEO. T. JACKSON,
Not. Pub., Richmond Co., Ga.

To the Louisville and Nashville Railroad Company and to The Atlantic Coast Line Railroad Company:

Please take notice that on Monday, the 16th day of March, 1903, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, a petition will be presented to the court by William A. Wright, as comptroller general of the State of Georgia, and application made for the issuing of the writ of certiorari, to be directed to the circuit court of appeals of the United States for the fifth circuit, to bring up for the review and determination of the Supreme Court of the United States, and for such other proceedings as shall seem best to that court, a transcript of the record, including the decision of said circuit court of appeals rendered the 13th day of October, 1902, in the case of William A. Wright, comptroller general, appellant, *vs.* The Louisville and Nashville Railroad Company and The Atlantic Coast Line Railroad Company, appellees, being No. 1156 on the docket of said fifth circuit court of appeals.

BOYKIN WRIGHT,
JNO. C. HART,
Solicitors for William A. Wright, Comptroller General.

Service of the above notice is hereby acknowledged and copy received this day by the Louisville and Nashville Railroad Company.

FEBRUARY 19, 1903.

KING & SPALDING,
JOS. B. & BRYAN CUMMING,
Sol'rs for L. & N. R. R. Co.

Service of the above notice is hereby acknowledged and copy received this day by the Atlantic Coast Line Railroad Company.

FEBRUARY 19, 1903.

KING & SPALDING,
JOS. B. & BRYAN CUMMING,
Sol'rs for Atlantic Coast Line Railroad Company.

[Endorsed:] In Supreme Court United States. William A. Wright, comptroller general, petitioner, *vs.* Louisville and Nashville R. R. Co., The Atlantic Coast Line R. R. Co., respondents. Petition for writ of certiorari. (Original.) Filed in clerk's office this — day of ——, 1903. —— ——, clerk. John C. Hart, Boykin Wright, solicitors for petitioner.

Kidd v. Alla + U.S. Supt Ct Fla

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In the Supreme Courtt of the United States.

OCTOBER TERM, 1902.

WILLIAM A. WRIGHT, Comptroller General, *Petitioner*,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO., and THE ATLANTIC COAST LINE RAILROAD CO., *Respondents*.

No. 20.

Petition for Writ of Certiorari.

Brief of BOYKIN WRIGHT and JNO. C. HART, Solicitors for Petitioner.

RICHARDS & SHAVER, STATIONERS AND PRINTERS, AUGUSTA, GA.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia, *Petitioner*,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO., and THE ATLANTIC COAST LINE RAILROAD CO., *Respondents*.

No. —.
Petition for Writ of Certiorari under Section 6 of the Act of March 3rd, 1891.

Brief of BOYKIN WRIGHT and JOHN C. HART,
Solicitors for Petitioner.

STATEMENT.

This was a bill filed in the Circuit Court of the United States for the Northern District of Georgia, by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, against William A. Wright, Comptroller General, to enjoin the latter from collecting from the Georgia Railroad & Banking Company, State taxes on certain shares of stock in the Western Railway of Alabama, complainants being the Lessees of the Georgia Railroad and liable under the terms of the Lease for taxes assessed against the Lessor.

The Lease was for ninety-nine (99) years from the first day of April, 1881.

Among the properties leased by the Georgia Railroad & Banking Company was its interest in the Western Railway of Alabama, which at the time of the Lease, was jointly owned by the Georgia Railroad & Banking Company and the Central Railroad & Banking Company, as tenants in common, each of said Companies owning one half undivided interest therein. For copy Lease see Record, p. 22.

Subsequent to the Lease the owners of the Western Railway of Alabama, viz: the Georgia Railroad & Banking Company, and the Central Railroad & Banking Company, had the same incorporated under the laws of Alabama as provided for in the Lease, with a capitalization of $3,000,000.00, divided into thirty thousand shares of stock, fifteen

thousand to the Georgia Railroad & Banking Company, and fifteen thousand to the Central Railroad & Banking Company. These fifteen thousand shares of stock have been held ever since, and are still held by the Georgia Railroad & Banking Company in the State of Georgia, the income of which, however, is paid over annually to the Lessees. The Georgia Railroad & Banking Company executed to the Lessees a Power of Attorney to vote said stock at the Stockholders' Meeting.

These fifteen thousand shares of stock are the property which the Comptroller General claims is subject to taxation. The object of the Bill was to enjoin the collection of this tax on the ground that there is no law authorizing the taxation of shares of stock held by a resident owner in a foreign corporation. An agreed statement of facts was entered into by the parties in writing and filed with the record in the case, to which reference is here made. An Answer was also filed in which a Demurrer was set up and a Motion to Dismiss the Bill, for want of equity, and because complainants had no such interest in the matter complained of as entitled them to maintain the Bill; the point being that the Georgia Railroad & Banking Company and not Lessees were the proper parties to bring this Bill, if maintainable at all.

There being no controversy as to the facts there were presented to the Court but two questions:

(1) Did the complainants have such interest in the matter complained of as to entitle them to maintain said Bill and such equity as to entitle them to relief by injunction?

(2) Whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad & Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia?

Judge Newman decided both of these questions in favor of the complainants in the Bill, and granted an injunction against William A. Wright, Comptroller General, perpetually enjoining him from issuing any execution or taking any steps to collect the taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Judge Newman in his opinion stated the issue as follows:

"It may be conceded first, as a general proposition, that the State has the power to treat shares in a corporation as distinct and separate property in the hands of the holders, should it desire to do so, for purpose of taxation; and further, if suitable legislation is enacted, it may carry out this purpose. This is supported by abundant authority, and is not questioned, as I understand, by counsel for the complainants in this case. Cook on Stock and Stockholders, Sec. 563; Tennessee v. Whitworth, 117 U. S. 129. Conceding this to be true, however, the real contention of counsel for complainants here is that the State of Georgia has not adopted this policy, and that the action of the Comptroller General in attempting to tax these shares is without authority of law."

See Record at p. 14.

SPECIFICATION OF ERRORS.

The Specifications of Errors set forth in the Circuit Court of Appeals were as follows:

First. That the Court erred in not sustaining defendant's demurrer to the bill, set up by way of answer, and dismissing the said bill, because:

(a) The complainants did not make such a case as entitled them in a Court of Equity to any relief from or against the defendants touching the matters contained in said bill, or any of such matters.

(b) Because there was no equity in said bill.

(c) Because complainants had no such interest in the matters complained of as to entitle them to maintain said bill, and to entitle them to relief by injunction.

Second. Because the Court erred in granting the injunction against William A. Wright, Comptroller General, perpetually enjoining him from issuing any execution or taking any steps to collect taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Third. Because the Court erred in granting the injunction against the Georgia Railroad & Banking Company, enjoining it from making any return of the shares of stock of the Western Railway of Alabama held by it, in the State of Georgia, for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed in the State of Georgia.

Fourth. Because the Court erred in holding and decreeing, "under the laws of the State of Georgia, and the decisions of its Courts, shares of railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia," and in not holding and decreeing to the contrary.

Fifth. Because the Court erred, under the facts and circumstances of the case, in holding and decreeing "that the said William A. Wright, Comptroller General, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as Comptroller General so to do," and in not holding and decreeing to the contrary.

The Circuit Court of Appeals affirmed Judge Newman's decision generally but filed no opinion

THE PETITION FOR WRIT OF CERTIORARI.

The Comptroller General of Georgia now files his petition to the Supreme Court of the United States for a writ of certiorari under Section 6 of the Act of March 3, 1891, requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination the said case, it being No. 1156 in the Circuit Court of Appeals, and specifies as errors of said Circuit Court of Appeals the same errors as above set forth; and in addition, stating the

following grounds why said writ of certiorari should be granted by this Court, to wit:

That the questions involved in said suit are of gravity and importance, in this:

(1) That the said suit and decision involved the question of interference by the United States Court by injunction with the State in the collection of its revenue and deprived the State in this particular case of the sum of $150,000.00, or other large sum.

(2) That said decision is in conflict with the decisions of the Supreme Court of Georgia interpreting that provision of the Constitution of 1877, declaring what property shall be taxed, and what property shall be exempt from taxation, the conflict being in this:

(a) That the said decision of the Circuit Court of Appeals for the Fifth Circuit holds that shares of stock in a foreign railroad are not property subject to taxation here, but mere representations or symbols of property, the only substantial property being that of the Railroad Company itself in the State where said railroad is located.

(b) That the said decision of the Circuit Court of Appeals in affirming the decision of the Circuit Court holds that the General Assembly of Georgia has the power to declare whether or not shares of stock in a foreign railroad or in any railroad shall be deemed and treated as property subject to taxation, whereas the Supreme Court of Georgia has distinctly held in several decisions to the contrary; and declared that the Legislature since the Constitution of 1877 has no power to classify subjects of taxation but that the said Constitution alone does this and forbids the Legislature from undertaking to classify subjects of taxation or to exempt any property not specifically exempted by that Constitution.

(c) The contention of the State of Georgia in this case is that since the Constitution of 1877, as interpreted by the Supreme Court of Georgia, all property not exempt by that Constitution is taxed, and that the Legislature not only has not exempted, but cannot exempt any item of property not specifically mentioned as exempt in that Constitution; and that inasmuch as shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself, these shares are taxable to the owner at its domicile.

(3) That the questions involved in said suit are of further gravity and importance in this, to-wit:

That the said decision of the Circuit Court of Appeals in holding that shares of stock in a corporation are not property but mere symbols of property is in conflict with the decisions of other Circuit Courts of Appeals and of the Supreme Court of the United States, and for this reason this Honorable Court should require the said case to be certified to it for review and determination, under and in conformity with the provisions of the said sixth section of the Act of Congress of March 3rd, 1891.

(4) That the questions involved in said suit are of further gravity and importance in this, to-wit:

That the said case was decided in the said Circuit Court of Appeals as well as in the Circuit Court upon the supposed authority of the decision of the Supreme Court of Georgia in the case of Wright, Comptroller General, v. Southwestern Railroad Company, reported in 64 Ga., 783, at 799.

Judge Newman rendering the opinion of the Circuit Court conceded that the State had the power to treat shares of stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783.

That decision is put on the theory that stock in a railroad is but so many shares of its property simply symbols or representations of the corporate property; and is contrary to the great weight of authority defining what a share is.

The said decision in 64 Ga., 783; was rendered under the Constitution of 1868 when the Legislature had the power to exempt from taxation any property either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga,, 80; (h. n. 1.)

But by the Constitution of 1877 the power to "exempt from taxation was taken away from the Legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80; (h. n. 2.)

Besides, when the decision in 64 Ga., was rendered there was no law requiring shares of stock in a foreign corporation to be returned for taxation as is now required by the Tax Act of 1898, and by the Acts of 1884-5, pages 28 and 30.

BRIEF OF ARGUMENT.

I.

COMPLAINANTS IN THE ORIGINAL BILL HAVE NO INTEREST AND NO EQUITY ENTITLING THEM TO RELIEF BY INJUNCTION.

After stating the fact of Lease and plaintiffs succession to the leasehold interest plaintiffs state their grounds for equitable relief in Section 13 to 19, both inclusive, of their Bill.

See p. 5 and 6 of Record.

It will be seen that it is not alleged that any tax or tax execution is *threatened* even against plaintiffs themselves, or their property. The demand for taxes on these shares is made upon the owner, the Georgia Railroad & Banking Company, and the levy and sale apprehended, is with respect to property of the Georgia Railroad & Banking Company.

Plaintiffs seek to connect themselves with the matter and to obtain a status in Court by showing that their leasehold interest might be effected if the threat were carried out.

It may be conceded that under the terms of the Lease, as between the Lessor and the Lessee, the Lessee by private covenant is obliged to pay these taxes, if legal.

But this private agreement between Lessor and Lessee does not affect the State's right to look to the real owner—Lessor—for its taxes, leaving the Lessor and the Lessee to adjust between themselves their respective rights under the Lease. Even if the State had the right to look to Lessees for the taxes it was not seeking to do so.

Plaintiffs allege that the demand for taxes is made on the Georgia Railroad & Banking Company and it is about voluntarily to return these taxes and pay them, they being illegal.

If so, how can that hurt plaintiffs?

Plaintiffs are liable to Lessor only for *legal* taxes, that is such as are collectible by law.

But plaintiffs say they are afraid the Georgia Railroad & Banking Company will voluntarily return the property for taxes and then allow the same to be collected by sale of the leased property, to the possession of which plaintiffs are entitled.

What reason have plaintiffs to apprehend that the Georgia Railroad & Banking Company would see their property thus sacrified to the payment of an illegal tax, and its interest therein lost forever?

None is stated in the Bill. Such an apprehension in baseless and does not furnish any sufficient ground to uphold an injunction by a Federal Court against the collection of a State's revenue.

The Court will not assume that the Georgia Railroad & Banking Company will do a foolish or senseless thing to its own hurt.

Besides, if the Georgia Railroad & Banking Company pays the tax it could not recover the same from complainants, if illegal; if it refuses

to pay and resists the payment the State could not collect the tax if illegal. How, therefore, could complainants be hurt in either event?

But would the Georgia Railroad & Banking Company either voluntarily pay an illegal tax or suffer its property to be sold to pay an illegal tax?

Will this Court exercise its extraordinary power of injunction and enjoin a sovereign State's taxes on the assumption that the Georgia Railroad & Banking Company will do such a foolish and such an unreasonable thing?

If the tax is illegal, of course, the Georgia Railroad & Banking Company will resist it by its proper remedies, either at law or in equity. It would have every reason of self-protection to do so.

Will this Court allow plaintiffs to litigate for and in behalf of the Georgia Railroad & Banking Company on the bare assumption that the Georgia Railroad & Banking Company will not litigate for itself and protect its own rights, simply because, under a lease contract with the Georgia Railroad & Banking Company, the Lessee has covenanted with the Lessor to be responsible for the taxes. Why should the State be thus forced to litigate with strangers in collecting taxes due by its own citizens?

Besides, the Georgia Railroad & Banking Company as Lessor is bound to protect Lessee in the undisturbed possession of the leased property, and should it fail to do so by allowing any portion of it to be seized to pay an illegal tax, the Georgia Railroad & Banking Company is solvent and amply able to respond to plaintiffs in a suit to enforce their rights under the Lease.

As was said in Shelton v. Platt, 139 U. S., 591:

"Irreparable injury is the sole ground upon which jurisdiction in equity can be regarded as invoked in this case. * * * * So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the Express Company to pay the amount of the tax as claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature *irremediable*. The bill showed the Company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy."

139 U. S., 591, et seq.

THE LAW BEARING ON THIS POINT:

A threat to levy a tax execution does not amount even to duress, and a payment under such a threat would be purely voluntary.

Hoke v. Atlanta, 107 Ga., 416.

The plaintiffs in this case are merely intermeddlers.

See Zachry v. Zachry ,68 Ga., 158;
McPhee v. Veal, 76 Ga., 656;
Picquet v. Augusta, 64 Ga., 254;
Southwestern R. Co. case, 64 Ga., at 897.

In the last named case the Court say that the S. W. R. Co. could not enjoin tax execution issued against its dependent line, the Fort Valley & Hawkinsville Co. The latter Railroad Company alone could maintain such a bill.

64 Ga., at top 797.

In Missouri River, etc., R. Co , v. Wheaton 7 Kan. 232, the syllabus is as follows:

"A person against whom no illegal tax has been assessed or levied upon, cannot, by injunction, restrain the collection of an illegal tax against another person."

7 Kan. 232.

In the same case the Court says:

"Can A. against whom no illegal tax has been assessed, maintain an action against the officers of Bourbon County, because they have assessed an illegal tax against B? We answer this question in the negative, and without any comment proceed to the next question."

Missouri River, etc. R. Co. v. Wheaton, 7 Kan. 232.

A stipulation by Lessee to pay taxes obligates him to pay only valid taxes; if Lessor paid or suffered to be collected out of its property illegal taxes plaintiffs would not be liable.

Clark v. Coolidge, 8 Kan. 189;
Bristol v. Hammacher 30 N. Y. Misc. 426.

Even if Lessor paid such a tax under duress plaintiff would not be liable

Kimball v. Corn Ex. Nat. Bank. 1 Ill. App. 209-217.

A single suit would determine once and forever the taxability of these shares; hence multiplicity can furnish no ground for equity.

Johnston v. Stone, 71 Miss., 593.
People's Nat. Bank v. Marye, 107 Fed. R. 570 at 577;
Bouton v. City of Brooklyn, 15 Barb. (N. Y.) 375.

FEDERAL COURTS OF EQUITY RELUCTANT TO ENJOIN COLLECTION OF A STATE'S REVENUE.

In the case above cited of People's Nat. Bank v. Marye 107 Fed. R., 570, Judge Waddill says:

"Courts of Equity are seldom called upon to exercise a more delicate power than that of granting injunctions to enjoin the collection of a State's revenue. Such power on the part of Courts is expressly inhibited by the federal statutes as to taxes due the United States, and federal courts should proceed with great caution in exercising such power as to taxes due the State. It is a prerogative the exercise of which may result in great harm, and only where the right is clear, the necessity for action urgent, and the inadequacy of any other remedy apparent, should a Court of Equity interpose. The Supreme Court of

the United States, in Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 37, 19 Sup. Ct. 90, 92, 43 L. Ed. 354, 356, speaking through Mr. Justice Gray, said :

" 'The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States unless it clearly appears not only that the tax is illegal but that the *owner* of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction.'

"In Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65, a citizen of the State of New York, owning shares in a national bank doing business in the city of Chicago, sought by bill in equity to enjoin the collection of a tax assessed by the city of Chicago upon its shares, for the reason, among others, that the tax was unconstitutional and void, because not equal and uniform, as required by the constitution of the State, and because, such shares also were not taxable by the City at the domicile of the defendant. The Supreme Court, through Mr. Justice Field, at page 112, 11 Wall., and at page 66, 20 L. Ed , said :

" 'Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a Court of Equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatenad injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked.'

" 'In the State Railroad Tax Cases, 92 U. S.. 575, 613, 615, 23 L. Ed., 669, 674, Mr. Justice Miller speaking for the Supreme Court, after stating that it had been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularily, of itself, gave the right of injunction in a Court of Equity, said :

" 'We do not propose to lay down in these cases any absolute limitation of the powers of a Court of Equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisprudence, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a Court of Equity to interpose by injunction to stay the collection of a tax.'

"It is well settled that a suit to enjoin the collection of a tax will not be entertained in Courts of Equity—at least in those of the United States—in which the sole ground set forth in the bill is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that the remedies in a court of law are inadequate, and so bring the case under some recognized head of Equity jurisdiction."

Per Taft, C. J. in Taylor v. Louisville, etc., R. Co. (C. C. A.) 88 Fed. R. 350, 357, citing the following cases:

Ogden City v. Armstrong, 168 U. S., 224, 236;
Express Co., v. Siebert, 142 U. S., 339;
Allen v. Car Co., 139 U. S., 391;
Railway Co. v. Cheyenne, 113 U. S., 516, 525;
Hennewinkle v. Georgetown, 15 Wall, (U. S.) 547;
Dows v. City of Chicago, 11 Wall. (U. S.) 108.

In Lumber Co. v. Town of Hayward, 20 Fed. R., 422, 425, Bunn, J. said:

"I am aware that some of the State Courts, particularly in Illinois, have gone a considerable way in the direction of allowing an injunction to restrain the collection of a tax. But we have seen and may see further by a reference to the decisions, what is the attitude of the general government, legislative and judicial upon this subject. And the general doctrine holds good by the weight of authority, state and national, that equity will not interfere except in special cases, as of fraud, to save a multiplicity of suits, or prevent irreparable injury or a cloud upon title to land."

In Pacific Express Co. v. Siebert, 142 U. S., 339, 348, Mr. Justice Lamar, in discussing equity jurisdiction to restrain collection of taxes said:

"When the illegality of the tax or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further, and make out a case that can be brought under some recognized head of equity jurisdiction."

Judge Newman says:

"Under the Georgia law, where tax is sought to be collected without legal authority, an injunction is the proper remedy. 64 Ga. 783-801; 71 Ga. 24-30; 85 Ga. 647-650; 107 Ga. 384.

"The same relief may be granted in the United States Courts as in a State Court, if the citizenship is proper."

154 U. S. 362-391;
168 U. S. 611-613."

Concede that under our State's decisions the Georgia Railroad & Banking Company, of whom alone the tax is demanded, could maintain the bill, what possible equity have the complainants from whom the Comptroller General claims no tax? If there is no law for the tax, why shall not the Georgia Railroad & Banking Company enjoin or resist it; if it pays the tax, it could not recover the same from the complainants; if it refuses to pay and resists, the State cannot collect it, if illegal.

The cases relied on are not in point.

The point is not that the Georgia Railroad & Banking Company might not, if citizenship were proper, maintain such a bill, but that these complainants are not in a position to do so. They can show no equity, because they have no interests that will suffer by the acts

claimed to be apprehended. If the tax demanded of the Georgia Railroad & Banking Company is without authority of law, the complainants have only to remain quiescent. In no event will they have it to pay.

II.

TAXATION OF THE SHAREHOLDER IN CORPORATIONS.

"Shares of stock in a corporation held by any person are taxable as such notwithstanding the fact that the corporation itself has paid a tax on its property, or its capital stock or both."

25 Ency. of Law, p. 662;
1 Ta lor on Private Corporations (2nd Ed.) 477 Sec.
Desty on Taxation (1st Ed.) Vol. 1, p., 356;
109 Ga., at 69 and 72;
State Bank v. Richmond, 79 Va., 113;
Memphis v. Ensley, 32 Am. R., 532;
Cook v. Burlington, 44 Am. R., 679;
Seward v. Rising Sun, 79 Ind., 353, reported in 13 Am. & Eng. R. Cas., 315

This is true because the "capital stock" and the "shares" are distinct properties.

25 Ency. Law, 663;
94 Ga., (201) 202;
136 U. S., 549 (Law Ed.) 527;
109 Ga., 63 at 69 and 72;
70 U. S., 573-584;
85 U. S., 206-230;
117 U. S., 129;
119 U. S., 265;
Cleveland Trust Co. v. Lander U. S. Sup. Ct. Oct. Term, 1901, decided April 1, 1902;
Van Allen v. Assessors, 3 Wall, 573.

In the case last above named Mr. Justice Nelson of the Supreme Court of the United States says:

'The tax on the shares is not a tax on the capital of the Bank. The corporation is the legal owner of all the property of the Bank, real and personal * * * * The interest of the shareholder entitles him to participate in the net profits earned by the Bank in the employment of its capital, during the existence of its charter, in proportion to the number of shares * * * * This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him."

3 Wall (U. S.) at page 583;

Read 136 U. S., 459 (Law Ed.) 527 1st column and citations.

To the same effect as above:

Burroughs on Taxation (1st Ed.) Sec. 86;
Cook on Stock and Stockholders and Corp. Law (2nd Ed.) Sec. 563-565;

Bradley v. Bauder, 36 O. St., 28, reported in 38 Am. R., 547;
Porter v. Rockford, etc. R. Co., 76 Ill., 561;
Danville Bank, etc. Co. v. Parks, 88 Ill., 170;
State v. Branin, 23 N. J. L., 484;
Minot v. Philadelphia, etc R. Co., 18 Wall. 206;
Commonwealth v. Delaware Division Canal Co., 2 L. R. A. 798, notes;
New Orleans v, Hous on, 119 U. S., 265;
44 Am. R , 679;
136 U. S. (Law Ed.) 527 1st column and citations.

TAXATION OF SHAREHOLDERS IN FOREIGN CORPORATIONS:

"A tax may be levied on shares of stock in foreign corporations, by the State of the owner's residence. This rule is not affected by the fact that the corporation has in its State paid taxes on capital stock or property or both."

24 Ency. of Law, pages 663, 664;
Sturgis v. Treasurer, 114 U. S., 511;
Worthington v. Sebastian, 25 Ohio State, 1;
McKeen v. Northampton, 49 Pa St., 519, reported in 88 Am. D., 515;
Worth v. Ashe Co., 82 N. C., 420, reported in 33 Am. R., 692; also 688;
State v. Branin, N. J. L., 484;
State v. Bentley, 23 N. J. L., 532;
Newark City Bank v. Assessor, 30 N. J. L., 13;
Seward v. Rising Sun, 79 Ind., 351, reported in 13 Am. & Eng. R. Cas. 315.

In the last above cited case the Court said: (a case distinctly in point) "There is no provision in our statutes, which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations * * * In the absence of any statute to the contrary, although a corporation may be taxable for its corporate property, the owner of shares of its stock may be taxed therefor where they reside."

13 Am. & Eng. R. Cas., 315.

This was upheld on the idea merely that "stock was personal property." There was no statute law declaring stock to be property. There was not even a question to the tax payer for listing "stock in foreign corporations." (See page 316.) It merely relieved shares in domestic corporations.

To the same effect:

Dwight v. Mayor, etc., of Boston, 12 Allen (Mass.) 316, reported in 9 Am. D., 149;
Dyer v. Osborne, 11 R. I. 321, reported in 23 Am. R., 460:
Bradley v. Bauder, 36 O. St., 28, reported in 38 Am. R., 547;
Appeal Tax Court v. Gill, 50 Maryland, 377.

In Dyer v. Osborne, above cited, Chief Justice Durfee said:

"The laws of *Rhode Island* are paramount in *Rhode Island* and all inhabitants of the State are subject to them without regard to the laws of any other State. * * * * It would certainly be going too far to hold that a man of wealth in *Rhode Island* cannot be taxed at all, if his property invested in the stocks of a manufacturing corporation of another State and there subject to taxation."

Ib.

23 Am. R., 460;

See, Worth v. Ashe Co., 90 N. C., 409.

"Certificates of stock of a foreign corporation held by a citizen of Ohio are taxable in that State, though a tax is also imposed on the property of such corporation situated in the State."

Sturgis v. Merchant Carter Treasurer, 114 U. S., 511 h. n. 4. (Law. Ed.) 240.

In the last above cited case the Western Union Telegraph Company was taxed upon such of its telegraph lines and property as were located in the State of Ohio; yet the Court held that a shareholder in the W. U. T. Company, residing in Ohio, was properly taxed upon his shares in the Telegraph Company, notwithstanding that the Telegraph Company was taxed upon its entire capital stock in the State of its incorporation, and also upon that portion of its property located in the State of Ohio.

114 U. S., 511.

But it is not denied by counsel for the Railroads that the foregoing is the general law. They admit that the authorities sustain taxing stock and property it represents as distinct properties assessable against separate and distinct owners.

They admit that Georgia *might* treat each as taxable property.

But they contend:

(1) That to tax the shares of the stockholders and the property of the corporation is double taxation, and hence the authority to so tax must be expressly given or necessarily implied by the tax act;

(2) That there is no express law, in Georgia, requiring a resident shareholder in a foreign corporation to pay taxes on his shares;

(3) That the law of Georgia has fixed the situs of shares of stock in a foreign corporation at the domicile of the corporation, and not at the domicile of the shareholder.

III.

NO DOUBLE TAXATION.

Taxing shares of stockholders and also property of corporation, not generally regarded as double taxation, because they are different properties and assessed against different owners.

25 Am. & Eng. Ency of Law, pages 666, at 670, citing many authorities;

95 U. S., 679–687;

114 U. S., 511 (Law. Ed.) 244.

In 95 U. S., 679–687, the Supreme Court of the United States, say: "The capital stock and the shares may both be taxed, and it is not double taxation."

95 U S., 679–687 (Law. Ed.) at 560.

"Double taxation in a legal sense does not exist unless double tax is levied upon the *same property* within the *same jurisdiction*."

Bradley v. Bauder, 36 Ohio St., pages 28–29, reported in 38 Am. R., at 548.

"The laws of the State of Ohio are not material. Where property is taxable by the laws of this State (Ind.) it is immaterial how much it is taxed elsewhere."

Seward v. Rising Sun, 13 Am. and Eng. R. R. Cas., at 316 (79 Ind. 353)

"Power to tax shares of stock, owned by our citizens in corporation located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same whether the capital of the corporation is there taxed or not; otherwise the power of taxation conferred by the Constitution would be made to depend upon the operation of the laws of a foreign jurisdiction—a proposition so obviously ill-founded that the moment it is stated its falsity becomes apparent."

36 Ohio St , 28, et seq., reported in 38 Am. R. at 549 and 550.

"The owner of a share of stock owns no part of the capital of the Company. The stock is personal property, which upon the death of the owner goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and in so doing works no change or modification in the title to the corporate property. From this it would seem to result necessarily that its *situs* for pu poses of taxation, when not otherwise provided by statute, is that of the domicile of the owner."

Badley vs. Bauder, 36 Ohio St., 28 et Seq., reported in 38 Am. R., 549.

The injustice which sovereignties generally seek to avoid is "double taxation" by the *same sovereign*.

Manifestly this principle cannot be applied as between *different sovereigns*.

Such a rule would operate in a way to deprive one State of its right to tax because some other State may have wrongly attempted to tax the same property.

If no double taxation, then there is no room for the rule of construction insisted upon applicable only in cases of double taxation.

In a learned note on this subject in 13 Am. and Eng. R Cases, at page 319, the following is stated as the result or conclusion of the law on this point, viz:

"The conclusion at which we have arrived may be thus summed up: a holder of stock in a foreign corporation is liable to be taxed on such stock in the State where he is domiciled.

The capital stock itself may also be taxed in the foreign State which is the domicile of the corportion.

The presumption is that the intention of the law was not to impose the latter tax. Clear and indisputable language must be used to overcome this presumption."

13 Am. & Eng. R. Cases, at page 319.

The above case held:

"That shares of stock in incorporated companies (foreign), whether the property of such companies be tangible or intangible are personal property;" and are taxable at the domicile of the owner.

13 Am. & Eng. R. R. Cases, at 315.

THERE IS NO OPPRESSION OR TYRANNY INVOLVED IN THIS TAXATION. It was claimed, with some degree of fervor and heat, by counsel for the Railroads that for the State to tax these shares when the property of the corporation was taxed in Alabama, would be *oppressive* and *tyranical*. Not so. The right to tax is not based upon a mere fiction or technicality of the law, but upon the substantial consideration that both the owner and his property in the shares enjoy the protection and benefit of the laws of this State and should on that account contribute their pro rata to the support of the Government. This view is ably stated *in re* Greenleaf (Ill.) 56 Northeastern Rep, at page 296.

In the above case the Supreme Court of Illinois declare:

"The shares of stock in the Kansas corporation held and owned by appellant are property within the jurisdiction of this State. They may be the subject of contracts of sale, barter or exchange under our laws; and the power of our laws may be invoked to enforce or defend such contract, and also to protect the property interest of Appellant in them against force, fraud, or theft. He is a resident of the State, and is entitled to invoke the authority of the State and the aid of our Courts to protect his property, including these shares of stock * * * * If the stock be not assessed for taxation, he will enjoy the benefits of the organized power of the State for the protection of his property rights and interest therein without being required to contribute to the support of the State Government in proportion as he enjoys its advantages and protection."

In Re Greenleaf, 56 Northeastern Rep., at page 296.

IV.

UNDER THE LAWS OF GEORGIA SHARES OF STOCK ARE TREATED AS PERSONAL PROPERTY AND SUBJECT TO TAXATION.

The lawyers for the Railroad Company and Judge Newman conceded that the State has the *power* to treat shares of stock as distinct and separate property for purposes of taxation, but say that the State of Georgia has not adopted this policy. Let us see:

The Constitution of Georgia prescribes an *ad valorem* tax on *all* property subject to taxation.

Section 5883 Georgia Code.

All property in the State divided in two classess only—that subject and that not subject to taxation.

82 Ga , 138.

84 Ga., 683.

Shares of stock in railroad companies not included in the exemptions authorized by the Constitution.

Georgia Code 5884, 5886.

Shares of stock in Georgia are personal property.

Georgia Code, Sec. 3070.

"Shares of stock in railroad companies shall be *deemed personal property.*"

Sec. 2165 of the Code;

40 Ga , 408 ;

94 Ga., 201 202 ;

109 Ga., 69-72 .

"All stocks and securities whether in corporations within this State or in other States" shall be construed to bee personal property for purposes of taxation.

Acts 1884-5, p. 28-30.

Shares of stock separate property from property of corporation.

94 Ga., 201-202 ;

58 Ga., 190 ;

95 U. S., 679 ;

96 U. S. 193 ;

109 Ga., 69-72.

The Legislature has no power to classify subjects of taxation. This our Constitution forbids when applied to property. The Constitution alone does this.

109 Ga., 70.

The decision in 109 Ga., at 72, distinctly declares that shares do not represent the property of the corporation, and that tax on the shares are a direct tax on property, viz., the property of the shareholder and not the property of the corporation.

109 Ga., at 72 and top of page 73.

To the same effect 109 Ga., page 80, et seq.

Any property which claims exemption must show express authority for said exemption.

104 Ga., at 297.

113 Ga., 883, at 885

74 Ga., 413.

Sturgis v. Carter, 114 U. S., 511.

Railroad companies are required to return each "class or species of property"—all property—to be "taxed as other property of the people of this State."

Code Sec. 780.

Likewise ordinary tax-payers are required to return specifically all property, including obligations for money, etc., whether the same are within or without the State.

Code Sec. 833.

The question then resolves itself into a simple one, viz: Are railroad shares "property;" if so and not exempt, the laws of Georgia tax them.

Code Secs. 780-833.

But the very tax act under which these taxes are claimed, *expressly* requires the shares of stock in a foreign corporation to be returned for taxation by the tax-payer, under oath.

Acts of 1898, page 36, Sec. 16, Par. 30, 31 and 32.

Also in this very Act the Legislature *recognizes* "stocks" as *property to be taxed*, in requiring "that the Agent in this State, or any person, firm or corporation, resident without this State, who shall have on hand for sale, storage, or otherwise, as such Agent, any merchandise or other property including money, notes, accounts bonds *stocks*, etc., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property of the State is taxed."

Acts of 1898, page 29.

Also the Act of 1884, p. 28-30, declares: "all stocks and securities whether in corporations within this State or in other States" to be personal property "for purposes of taxation."

Act 1884-5, p. 28-30.

In Georgia the Constitution classifies the subjects of taxation. The Legislature has nothing to do with it. By the Constitution all property is taxed, except religious, charitable, public or educational property.

109 Ga., 68 and 70.

But if the legislative intent be considered of importance, how could that intention be made more manifest than in the said Act of 1898 and in said Act of 1884-5, p 28-30.

V

IT IS NOT NECESSARY THAT THE TAXING LAW SHOULD SPECIFY A PARTICULAR ITEM OF PROPERTY FOR TAXATION; IT IS ENOUGH IF IT COMES WITHIN THE CLASS OF PROPERTY MADE TAXABLE.

A tax upon "shares of stock" has been repeatedly upheld upon such general provisions of the law as provide for the taxation of "personalty" or "personal property," or "all property" not exempt.

See Seward v. Rising Sun, 79 Ind., 351, reported in:

13 Am. & Eng. R. Cases, 315, 316;

Dyer v. Osborne, 11 R. I., 321, reported in 23 Am. Rep., 460;

Dwight v. Mayor of Boston, 12 Allen, 316, reported in 90 Am. Dec., 149;

McKeen v. County of Northampton, 49 Pa. St., 519, reported in 88 Am. Dec., 515.

In Seward v. Rising Sun, cited above, the law simply provided a tax "upon all personal property" owned by persons residing in this State, etc., the Court held that the "shares of stock in incorporated com-

panies, whether the property of such companies be tangible or intangible, are personal property. Cooley on Taxation 16, 2 Kent. Com. 340, note," and, therefore, taxable under this provision.

13 Am. & Eng. R. Cases 315, 316.

In Dyer v Osborne, the law under which the shares of a resident stockholder in a foreign corporation was taxed, declared merely "That all real property in the State and all personal property belonging to the inhabitants thereof shall be liable to taxation unless otherwise specially provided." Section 10 of Chapter 39, declared as our Code declares, that "personal property" included stocks or shares in corporations not exempted from taxation.

23 Am. Rep. 461.

On this general provision, the Court held:

"The owner of shares of stock in a foreign corporation, is liable to taxation thereon in the State where he resides, although he has paid tax thereon in the State where the corporation is located."

23 Am. R. 460.

Likewise in Dwight v. Mayor of Boston, the shares in foreign corporation were taxed merely under the law taxing "all personal estate," the Court holding that as such they were taxable in the place where the owner resides.

90 Am. Dec., at 149.

Likewise, in McKeen v. County of Northampton, "shares of stock" were subjected merely under the general law taxing "personal property," the Court holding:

"The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him and when he dies, his domicile governs its succession. It goes to his executor or administrator, and not to the heirs, and is carried into the inventory of his personal effects * * * * Its ownership has its legal *situs* at the domicile of the owner."

88 Am. Dec., at 516 and 517.

We insist that the Tax Act of 1898 specifically requires the return of these shares for taxation but the foregoing decisions are cited to the point that such specification is not necessary since the Constitution of 1877 requires *all* property to be returned for taxation, except that which it specifically exempts, and the Code and the Act of 1884-5, p. 28-30, and the late decisions of our Supreme Court declare shares of stock to be personal property and separate and distinct from the property of the corporation.

Code §3070, 2165; 109 Ga 72.

94 Ga. 202.

109 Ga. 80.

The Supreme Court of Georgia in its very latest deliverance on this subject in 109 Ga., at pages 96 and 97 has declared in language that is unmistakable what property the Constitution taxes, as follows:

"The language would seem to be plain, its purpose unmistakable, to require all property to be taxed not only uniformly, but ad valorem. It left no loophole to escape. There was to be no classifying of prop-

erty; no exempt property except that specifically allowed to be exempted by the Constitution. The rule was absolute: Property, tax according to value."

109 Ga., at 96.

Again, in this very decision the Court declares:

"Once for all, the Constitution has enumerated the two classes of property, which enumeration the legislature, the courts, and the citizens must recognize as exhaustive; property, whatever its species, is simply exempt or subject to be taxed. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value * * * * If this is not a clear, plain and pointed statement, I despair of attempting to express the idea more strongly. If any part of the act of the Legislature is contrary to the Constitution, that instrument in express terms provides that it shall be the duty of the courts to so declare it."

109 Ga., at 97.

VI.

SHARES OF STOCK IN FOREIGN CORPORATIONS HAVE THEIR SITUS, AND ARE TAXABLE IN THE STATE IN WHICH THE OWNER RESIDES.

That the above is true, both at common law and according to the great weight of authorities, is not denied. As stated by the Supreme Court in 18 Wallace 206, (Law Ed.), at 896, *shares of stock* are "an interest or right which accompanies the person of the owner, *having no locality independent of his domicile.*"

18 Wall, 206 (Law Ed.) at 896,
Van Allen v. Assessors, 3 Wallace, 583;
Union Bank v. State, 9 Yerg. 501;
Bradley v. Bauder, 36 Ohio St., 28, reported in
38 Am. Rep., at 549;
Cooley on Taxation, 16;
Burroughs on Taxation, 188;
Cook on Stock and Stockholders (3rd Ed.) Sec. 566, note 2nd col.
McKeen v. County (Pa.) 88 Am. Dec., at 517.
Belo v. Commissioners, 82 N. C., 415, reported in
33 Am. Rep., at 690;
In Re Greenleaf, 56 Northeastern Rep. (Ill. Feb. 1900), at page 295 and 296;
State v. Kidd, 28 Southern Rep. (Ala.) 480; Affirmed U.S. Supreme Ct. Jan'y 2-31
See, Notes 56 Am. Dec., at page 528.

Of course the State of Alabama could not fix the *situs* of shares of stock held in Georgia by citizens of this State.

"One State cannot impair another's right to tax property within its limits."

See, 56 Am. Dec., notes at page 528;
Appeal Tax Court v. Patterson, 50 Maryland, 354;
Seward v. Rising Sun, 13 Am. & Eng. R. Cases, at 316, where the Court holds:

"There is no provision in our Statutes (Statutes of Indiana) which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations. * * * * The laws of the State of Ohio are not material. Wh re property is taxable by the laws of *this* State it is immaterial how much it is taxed *elsewhere*."

13 Am. & Eng. R. Cases, at 316, near bottom;
36 Ohio State, 28, reported in
38 Am. Rep., at 549 and 550.

In McKeen v. County, above cited, the Court say:

"Though local authority may attach to the stock for special purposes, its *ownership* has its *legal situs at the domicile of the owner*."

88 Am. Dec., at 517.

Hence the Supreme Court of the United States in 177 U. S., 1, he'd that Michigan for certain special purposes could fix the situs of shares of its own corporations in that State, and sustained an action to remove the cloud upon the title to the shares of stock on the ground that said shares under the Michigan statute were located th re for purposes of jurisdiction in that case.

177 U. S., 1.

While the Court seemed to express doubt as to whether Michigan could give said shares a situs for purposes of *taxation*, it never remotely hinted that said shares were not subject to taxation in Massachusetts, where the owner of some of the shares resided. This had already been settled by that high Court.

95 U. S., 679 (Law. Ed.) 558;
96 U. S., 193 (Law. Ed.) 654;
114 U. S., 511 (Law. Ed.) 244; and several later decisions.

Has the State of Georgia changed the rule and fixed the situs of shares of stock at the domicile of the corporation and not at the domicile of the owner?

Confessedly, neither the Constitution nor the General Assembly has done so. But it is claimed that this has been accomplished by certain decisions of the Supreme Court of Georgia; the one chiefly relied on being Wright, Comptroller, v. S. W. R. R. Co., 64 Ga., at 799. We will discuss this decision presently. The other decisions cited appear not to be in point. But granting that the Courts could thus fix the situs of shares without authority of the Constitution or of the Legislature, and in contravention of the established doctrine that the situs of shares of stock is at the domicile of the owner, and that 64 *Ga.*, *did so*, an entirely *different rule* has been since established by the General Assembly, and by later decisions of the Supreme Court interpreting the new system of taxation embodied in the Constitution adopted subsequent to that decision.

See, Tax Act of 1898, pages 35 and 36; Acts 1884–5, p. 28–30.
Georgia B. & L. Association v. Savannah, 109 Ga., 69, 70, 71, 72;
Atlanta, etc. Co, Stewart 109 Ga., 80 et seq.;
94 Ga., 202.

Clearly the Legislature had in mind in framing the Tax Act of 1898

the fact that many items of property subject to be taxed under the new Constitution, including shares of stock in foreign corporations, had hitherto escaped the tax officers; hence it provided as follows:

"In addition to the questions now propounded to taxpayers by the Tax Receivers, questions shall be framed by the Comptroller General to reach *all* property upon which a tax is imposed by this act, and especially the following questions: * * * How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporation located without this State? What was the gross nominal value thereof? What was the fair market value thereof?

Acts of 1898, page 35, near top, and page 36, near bottom.

Here the Legislature expressly provides the "machinery" for placing railroad shares in foreign corporations on the Tax Digest.

(109 Ga., 80, et seq.)

The law defining what property should be taxed (Consti. of Georgia, Code Sec. 5883 and Sec. 780, Vol. 1 of the Code) was already broad enough and needed no addition or revision. It was only necessary to provide the "machinery" for placing it upon the Tax Digest. This it did by the provision above quoted.

In the same Act (1898 at page 29) as we have seen, stocks of a non-resident owner held by an Agent in this State are required to be returned for taxation.

Acts of 1898, page 29.

In the light of the foregoing, and of Sections 3070 and 2165 of the Code and the Act of 1884–5, p. 28–30, declaring shares of stock to be personal property for purposes of taxation, can the Court escape the conclusion that these shares held here by the Georgia Railroad & Banking Company are taxable as property, under the Constitution and laws and decisions of this State?

ARGUMENT.

To recapitulate:

What does the law of Georgia tax? This question is answered by the Constitution of the State, which is the Supreme law. In Georgia relatively to taxation there is only one classification of property—it is either exempt from taxation or subject to be taxed and if subject to be taxed the Constitution taxes it. If exempt it pays nothing; if subject it pays according to its value.

Verdery v. Village of Summerville, 82 Ga., 138.

Under the Constitution of Georgia if property is taxed all of it must be taxed except that exempt in the Constitution. "Taxation on property must be upon all not exempted in the Constitution with a uniform rate on all kind.

Mayor v. Weed, 84 Ga., 683.

"The Constitution of the State requires that taxes on property should be ad valorem and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception."

Wells v. Mayor and Alderman, 87 Ga., 400.

In this case the Court says: "Whatever the expectation of purchasers or the unbroken practice of the City hitherto may have been the mandate of the Constitution of 1877 is to tax all property, save, that expressly exempted by the Legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

87 Ga., 401-2.

See also 107 Ga., 1-5.

"When the tax officer goes forth to list property which is taxable all that which he finds employed in the ordinary uses of common life, unless it belongs to the public, he is to regard as taxable."

Mundy v. Van Hoose, 104 Ga., 300.

The Constitution of Georgia requires that all property of every kind of all persons and corporations within the territorial limits of the authority levying the tax and not exempt by the Constitution shall be taxed.

In Atlanta Nat. Assn. v. Stewart, it is held that under the Constitution of Georgia, "The General Assembly cannot lawfully either expressly exempt from taxation, or accomplish this result by failure to tax any property except that which in the Constitution itself the General Assembly is expressly authorized to exempt."

(109 Ga., 80).

As to the subjects of taxation these are fixed by the Constitution and no other law is necessary. All property in the State must pay taxes unless it is exempt by the Constitution. These shares of stock are confessedly, not exempt and if they are property in the State they are subject to taxation as all other property. The General Assembly could not relieve them by express enactment nor by failure to tax. If they are property within the State it is the mandate of the Constitution, quoting the language of the Supreme Court that they should be taxed. That they are property will not be controverted. It only remains to inquire are they property within the State.

We have seen the general rule is that stocks are personal property and have their situs with the owner.

1 Moraeritz, Sec. 224-5-6: 2 R. I. 321 (23 Am. Rep. 460).
49 Pa. St. 519 (23 Am. Rep. 465);
82 N. C. (33 Am. Rep. 688 90);
15 Wall 324;
3 Wall 584;
4 Wall 258;
18 Wall 229-30;
2nd Woods 144;
62 Am. St. Rep 458;
Code of Georgia 1895, Sec. 3070;
30 Ga., 442;
40 Ga., 408;
50 Ga., 393;

Judge Newman concedes that the State has the power to treat shares of stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783

That decision is put on the theory that stock in a railroad is but so many shares of its property. As we have seen that theory is contrary to the great weight of authority defining what a share is.

Morawertz, Section 224-225;
69 Pa., 407;
50 Am. Rep. 131-2.
2 Woods 144;
1 Woods 18;
3 Wall 584;
18 Wall, 229-30.
94 Ga., 202.
109 Ga., 69-72.

Besides when the decision in 64 Ga., was rendered there was no law requiring shares of stock to be returned for t[illegible]ion as is now required by the Tax Act of 1898.

That act requires stock issued by corpo[illegible]ions located without the State to be returned for taxation. Why returned? The conclusion is irresistible that it was for taxation. The State could have no authority to institute such an inquisition except for taxation. Otherwise it would be not only a meaningless ceremony but an unauthorized and impertinent inquiry into the private affairs of the citizen. The Judge in the Circuit Court held that there should be a reasonably clear Legislative intent. Is not the intent of the Act of 1898 reasonably clear that the Legislature intended such shares should be returned for taxation and taxed. This provision of the act means something. If it does not mean that such shares are to be taxed what does it mean? If it does not mean this the tax payers could legally refuse to make this return. Would any Court so hold?

Certainly it cannot be maintained that the Legislature must say in *totidem verbis* that "shares of stock issued by a corporation located without the State are hereby taxed." That Act requires the taxpayers to return these shares of stock and the value on the day fixed for *the return of property for taxation.*

The legislative intent as to such shares of stock is as clear and unmistakable as to any other property to be returned for taxation. Is it not unmistakably clear under that Act that horses, mules, etc., improved city or town lots, money on hand, notes, accounts, judgments, fi. fas. against persons within or without the State, bonds issued by corporations in and out of the State and all the other property enumerated, are to be taxed? It will not be disputed that all these are to be taxed. If it is so clear as to all these, how does it become obscure or doubtful as to these shares of stock. They are all in the same Section of the same Act.

Whatever was the rule or policy of the State as declared in 64 Ga., 783, it is submitted with all confidence that the rule or policy as declared by the Act of 1898 is unmistakable that such shares of stock are to be taxed. The power to establish such rule or policy is conceded.

It is no answer to say that stockholders in other railroads do not pay a tax. It may be they should pay. But it is conceded that the State

has the right to fix a rule or policy. This being so, it could tax shares of a corporation out of the State and not tax shares of a corporation in the State—the capital stock or property being taxed. But it is said wh le the State has the power to fix such rule or poli y there "should be a clear expression of legislative intent." Has there not been such an expression? The Act of 1898 furnishes a simple, plain answer. It requires these shares of stock to be returned for taxation which would seem to be a clear, unmistakable expression that they are to be taxed. There is no other conceivable reason for this requirement.

Also the Act of 1884-5, p. 28-30, furnishes an answer.

How is the legislative intent to levy a tax on any property expressed except by authorizing the proper officer to assess and levy a tax and requiring the return of the property. This has been done as to this stock. It is conceded that the question is not what the State can do, but what it has done. That if there has been a clear expression of legislative intent to treat shares in a corporation as distinct and separate property in the hands of the holders, these shares must be taxed. Such intent is clearly apparent under the Act of 1898. If not what is the intent? Is the State inquiring after a mere symbol—a vanishing shadow? The property of the corporation is in Alabama and beyond reach. If it is the rule or policy of Georgia to regard these shares as also located there what right has Georgia to inquire of the tax payer how many he has or their value. The requirement that these shares and their value, must be returned for taxation is either meaningless—senseless and unauthorized or it is a clear declaration that they are to be treated as distinct and separate property in the hands of the holders. The State cannot treat them at all—it has no concern as to them unless they are distinct and separate property no more than it has with any other personal property physically located in Alabama. But it does treat with them and the conclusion is irresistible that it intended they should be regarded as distinct and separate property.

Our inquiry is not what was the rule or policy in Georgia twenty years ago when the decision in 64 Ga. was rendered under another tax system, but what it is now under a new system and a new Constitution intended to subject prope ty theretofore not taxed. If it be conceded that under that decision shares were to be regarded as only representing an interest in the property of the corporation and as in substance the same, it is admitted the State had the power to declare a different policy. It has clearly done so by the Act of 1898.

To now hold that these shares are so much interest in real property in Alabama would put the Legislature in the worse than ridiculous attitude of requiring a return of such an interest. Nor would its attitude be less ridiculous by changing the phraseology of the proposition and saying that these shares are a mere shadow of a substance that is located in another State. The Act of 1898 on the subject means something and it can mean nothing else than that whatever may have been the policy theretofore under that Act such shares should be treated as distinct and separate property in the hands of the holders. This being so it is conceded that they are to be taxed.

Besides in this very Act (1898, p. 29) the Legislature recognizes "stocks" *as property to be taxed*, in requiring that the "agents in this State of any person, firm or corporation resident without this State, who shall have on hand for sale, storage or otherwise, as such agent, any merchandise or other property including m ney, notes, accounts, bonds, STOCKS, &c., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property in this State is taxed."

Acts 1898, p. 29;

See also 94 Ga., at 202.

If 64 Ga., 799 under the old Constitution holds that stock in a corporation is only so much interest in the property of the corporation, see 109 Ga., 72, where the Court distinctly holds: That the tax on the shares of stock was a tax against the property of the shareholder and in no sense relieved the property of the corporation from taxation.

109 Ga., 71-72, citing 94 Ga., 202.

The Court further says: "There can, therefore, be nothing in the claim in this case that the shares of stock taxed represent the property of the corporation; nor from its nature, as above shown, can it be successfully contended that the tax provided for is anything but a direct tax on property."

109 Ga., 72.

COMMENTS ON 64 GA., 783 AT 799.

The dictum of Judge Jackson in 64 Ga., 799 (Wright, Comptroller, v. S. W. R. Co.) to the effect that shares in a railroad company simply represents the property which is real estate and is not taxable as property in the hands or the owner of the shares, was clearly not well considered at the time, and is now manifestly unsound in principle and at variance with established authority. (See authorities cited to this point in other portions of Petitioner's Brief.)

In extenuation of this deliverance in 64 Ga., the following is quoted from the decision itself at the conclusion, viz.:

"Indeed all the points decided (herein) may require revision when the case is fully tried and all the facts are brought out. The views given above are merely indications of what we now think, from our understanding of this record as it now appears."

64 Ga., at 801.

The above decision was rendered on the preliminary injunction and sent back for trial on its merits.

It should also be remembered that the case in question arose under the Constitution and laws existing before the Constitution of 1877 requiring all property to be taxed, except that which was therein specifically exempt.

It must also be remarked that by the express Statutes of Alabama where the W. A. Railroad is located, shares of stock in a railroad is declared to be personal property.

When the case in 64 Ga., was decided, the Legislature had the power to exempt from taxation any property, either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga., 80 h. n. 1.

At that time railroad shares enjoyed this immunity, because there was no provision made for *listing and assessing* this property.

But by the Constitution of 1877 the power to "exempt" from taxation was taken away from the Legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80 h. n. 2.

But the Legislature has not since tried to do so by *either* method. On the contrary in the Tax Act of 1898, page 36, the Legislature expressly provides for placing railroad shares in foreign corporations on the Tax Digest. Also in the Act of 1884, 5 p. 28 and 30, shares in foreign corporations were expressly declared to be personal property for purposes of taxation.

The law defining what railroad property should be taxed (Section 780 of the Code) was already broad enough and needed no addition or revision to make it conform to the Constitution of 1877.

It was only necessary, therefore, for the Legislature to provide the necessary machinery for placing it upon the Tax Digest. This it did in the Act of 1884–5 and the Act of 1898, which included all "taxable" property and submitted a specific question with respect to railroad shares in foreign corporations. And by the Constitution *all* property is "taxable" except that which is exempt.

CHOSES IN ACTION TAXABLE IN GEORGIA AT THE DOMICILE OF THE OWNER.

In 50 Ga., at 392, our Supreme Court, overruling 33 Ga., at 113, say:

"The property in bonds and notes or other obligations to pay money is located at the place of the residence of the owner of them, and that at least since the first of January, 1863, when the Code went into effect, such is the law of this State for purposes of taxation.

50 Ga., 392-3.

In the same case at page 393, the Supreme Court further says:

"But the current of authorities as to stocks, bonds and notes for money, very decidedly fixes their locality at the residence of the owner for taxation."

50 Ga., 393.

Here, the Court distinctly announces that in Georgia "stocks" as well as bonds, notes, etc., have their situs for taxation at the domicile of the owner.

50 Ga., 393;
Cited and approved in 104 Ga., 497;
Atlanta, etc., v. Stewart, 109 Ga., at 87; 90 Ga., 648.

"Bonds, notes or other obligations for money, on persons in other States, or of other States, or bonds of corporations of other States, and shipping are the subjects of return and taxation in this State."

Code Sec. 776;
50 Ga., 387, 392;
104 Ga., 497;
109 Ga., 87;
90 Ga., 648;
Acts of 1898, p. 36.

THE ACT OF 1884-5 AND THE CODE OF 1895.

But counsel for the railroads seek to get rid of the force of the Act of 1884-5, p. 28-30, declaring shares of stock in foreign corporation to be taxable by saying that this Act was not codified into the Code of Georgia of 1895.

This Act is substantially embraced in the Code of Georgia of 1895, and certainly nothing in the Code is in conflict with said Act.

See, Civil Code Vol. 2, Sec. 3070;
Civil Code Vol. 2, Sec. 2165;
Vol. 1 of Code, Sec. 833.

The substance of this Act being already embraced in the above named sections of the Code (Secs. 3070 and 2165) there was no occasion for its repetition.

But the omission from the Code of an Act in force before its adoption does not repeal said Act if not inconsistent with the provision of the Code.

See, 53 Ga., 675;
112 Ga., 40 (1);
42 Ga., at 195 and 196;
111 Ga., 760 at 768, 769 and 770.

Of course the adopting Act validates what is contained in the Code.

104 Ga., 831;
114 Ga., 533.

But it does not repeal pre-existing statutes which may not be incorporated in the Code.

Unless the contrary manifestly appears from the words employed the language of the Code should be understood as intending to state the existing law and not to change it.

107 Ga., 599.

But this Act of 1884-1885, pages 28 and 30, is cited mainly as a conclusive reply to Railroad Company's contention, as approvingly stated by Judge Newman, "that while the State has the power to treat shares as distinct and separate property in the hands of the holders * * * for purposes of taxation," the Legislature of Georgia has not expressly done so.

Surely, the "legislative intent" so earnestly searched for by Judge Newman is found expressly stated in the Act above quoted.

APPENDIX.

STATUTES CITED IN BRIEF NECESSARY TO THE DECISION OF THE CASE.

Constitution of Georgia, viz:
Code Sections 5883-5884 5886;
Code Sections 3070, 2165, 780;
Acts 1898, p. 35, 36, Sec. 16, Par. 30, 31, 32;
Acts 1898, p. 29;
Acts 1884–5, p. 28–30.

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may, however, impose a tax upon such domestic animals as, from their nature and habits, are destructive."

Constitution of Georgia, Code Sec. 5883.

"The General Assembly may, by law, exempt from taxation all public property, places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association, kept in a public hall, and not hold as merchandise or for purposes of sale or gain: Provided, the property so exempted be not used for purposes of private or corporate profit or income."

Constitution of Georgia, Code Sec. 5884.

"All laws exempting property from taxation, other than the property herein enumerated, shall be void."

Constitution of Georgia, Code Section 5886.

"Personalty, or personal estate, includes all such property as is movable in its nature; in fact, everything having value inherent in itself, or the representative of value, and not included in the definition of realty. Stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, are personalty."

Code Sec. 3070.

"The stock in said railroad company shall be deemed personal property and shall be transferable in the manner prescribed by the by-laws of the company, and no share shall be transferable until all previous calls thereon shall have been fully paid in. All property, whether real or personal, of any stockholder in this State shall be exempt from the debts or liabilities of said company, except to the amount of the unpaid subscription of said stockholder to the capital stock of said corporation. In no case shall said road be bonded or capital stock increased except by a vote of *two-thirds of the capital stock of said corporation* represented at an annual or a special meeting of stockholders called for that purpose, and after each stockholder has been notified in the manner prescribed for notifying stockholders, and in addition to said notice there shall be published in some newspaper in the town or city where the

principal office of said corporation is located, once a week for four weeks prior to the time of holding said meeting, a notice stating that at said meeting so called an increase of the stock or an in issuance of the bonds of the road would be considered, either or both. No action contemplated under this section looking to an increase of stock or issuance of bonds shall be legal unless there shall be present at said meeting a majority of stock, represented in person or by written proxy."

Code Sec. 2165.

"In addition to the questions now propounded to tax-payers by the tax-receivers, questions *shall* be framed by the Comptroller-General to reach *all property* upon which a tax is imposed by this Act, and especially the following questions * * * *

How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?

What was the gross nominal value thereof?

What was the fair market value thereof?

Acts of 1898, pages 35 and 36, Sec. 16, Par. 30, 31 and 32.

"And provided further, that the agent in this State, of any person, firm or corporation, resident without this State, who shall have on hand for sale, storage or otherwise, as such agent any merchandise or other property, including money, notes, accounts, bonds, *stocks*, etc., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property in this State is taxed."

Acts of 1898, p. 29.

"The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Competroller-General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State.

Code Sec. 780.

1. Section 2 of the Act of 1884-5, entitled.

"An Act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes.

"Section 2. Be it further enacted, That personal property shall be construed, for purposes of taxation, to include all goods, chattels, monies, credits and effects, whatsoever they may be, all ships, boats and vessels belonging to the inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due the person to be taxed; *all stocks and securities*, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt by the laws of the United States or of this State."

See Georgia Laws of 1884-5, pages 28 and 30.

Respectfully submitted,

BOYKIN WRIGHT,
JOHN C. HART,
Solicitors for Petitioners.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WILLIAM A. WRIGHT, Comptroller General of Georgia, vs. THE LOUISVILLE & NASHVILLE RAILROAD CO., and THE ATLANTIC COAST LINE RAILROAD CO.	*Petition for a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Fifth Circuit.*

Brief of BOYKIN WRIGHT and JOHN C. HART, Attorney General of Georgia, Solicitors for Petitioner, to the Point that this Petition Presents Questions of "Gravity and Importance."

WHEN THE WRIT OF CERTIORARI SHOULD BE GRANTED UNDER SECTION 6 OF THE APPELLATE COURT ACT OF MARCH 3RD, 1891.

I.

It is undeniably true that this Writ is granted only in cases of "gravity and importance."

Ex Parte Lau Ow Bew, 141 U. S., 583 (L. Ed.) 868;
Lau Ow Bew vs. U. S., 144 U. S., 47-58 (L. Ed.) 340-344;
American Construction Co. vs. Jacksonville, etc., R. R. Co., 148 U. S., 372-378 (L. Ed.) 486-490 and 491;
U. S. vs. The Three Friends, 166 U. S., 1-83 (L. Ed.) 897;
Forsythe vs. Hammond, 166 U. S., at 514 (L. Ed.) 1095 at 1098;
The Conqueror, 166 U. S., 110-136 (L. Ed.) 937;
In Re Woods, 143 U. S., 202 (L. Ed.) 125.

II.

The inquiry upon such an application is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this Court to issue the writ.

Ex Parte Lau Ow Bew, 141 U. S., 583 at 589 (L. Ed.) at 870.

III.

It would be a work of supererogation to here recount before this Court the cases, and character of questions involved, wherein this writ has been granted. While issued "sparingly" it nevertheless has been recently issued in numbers of cases wherein the gravity and importance of the questions involved, it is respectfully submitted, cannot compare with the gravity of the questions in the case at bar, as set forth in the petition for the writ.

As for instance, see

O'Brien vs. Wheelock, 184 U. S., 450;
Mueller vs. Nugent, 184 U. S., 1;
Fidelity & Deposit Company vs. Courtney, 186 U. S., 342 (L. Ed.), 1194;
Hagan vs. Scottish Union, etc. Co., 186 U. S., 423;
Farmers Loan & Trust Co. vs. Penn Plate Glass Co., 186 U.S., 434;
Ward vs. Joslin, 186 U. S., 142 (L. Ed.), 1093;
Williams vs. Gaylord, 186 U. S., 157;
Connecticut Mutual Life Ins. Co. vs. Hillman, October Term 1902, No. 94, decided Feb. 2, 1903;
Hale, Receiver, vs. Allenson, October Term 1902, No. 77, decided February 16th, 1903;
Burt vs. Union Central, etc. Ins. Co., October Term, 1902, No. 70, decided December 22nd, 1902;
Warden vs. California Fig Syrup Co., No. 36, October Term, 1902, decided January 5th, 1903.

O'Brien vs. Wheelock, above cited, involved simply the question of the legality of certain assessments for levee.
184 U. S., 450.

Mueller vs. Nugent, above cited, involved the validity of an order of Court committing a bankrupt, in order to compel surrender of property.
184 U. S., 1.

Fidelity & Deposit Co. vs. Courtney, above cited, involved simply the question of what were the respective duties owing by the parties to each other, under an indemnity bond.
186 U. S., 342 (L. Ed.), 1194.

Hagan vs. Scottish Union, etc. Co., above cited, involved merely the interpretation of, and liability under, an insurance policy, amounting to less than $2,000.
186 U. S., 423.

Farmers Loan & Trust Co. vs. Penn Plate Glass Co., above cited, involves simply the question of mortgagee's equitable right to insurance money after property destroyed by fire.
186 U. S., 434.

Ward vs. Joslin, above cited, involved simply the question that a judgement on a corporate contract ultra vires did not preclude stockholder from setting up the ultra vires character of the obligation when sued on his individual liability as a stockholder.
186 U. S., 142 (L. Ed.) 1093.

Williams vs. Gaylord above cited, involved merely the question of how the stockholders of a mining company could ratify the action of the corporation under the California Statute.
186 U. S., 157.

Connecticut Mutual Life Insurance Co., vs. Hillman, above cited, was an ordinary controversy over a life insurance policy and apparently the most important point at issue was a rather close question as to admissibility of certain evidence.
October Term, 1902, No. 94, decided February 2nd, 1903.

Hale, Receiver, vs. Allenson, above cited, involved simply the question whether a Receiver of an insolvent corporation appointed in one State could sue in equity the stockholders in a foreign State on their liability as such to creditors.
October Term, 1902, No. 77, decided February 16th, 1903.

Burt vs. Union Central, etc., Insurance Co., involved simply the question whether a policy of life insurance insures against the legal execution for crime of the insured.
No. 70, October Term. 1902, decided December 22nd, 1902.

Warden vs. California Fig Syrup Co., involved simply the question of whether a certain trade mark of "Syrup of Figs" should be protected against an imitation of the same trade mark, the first party having himself practiced a fraud on the public in adopting said trade mark.
October Term, 1902, No. 36, decided January 5th, 1903.

The above are a mere sample of some of the recent cases in which this high Court deemed the matters of sufficient "gravity and importance" to authorize the grant of this writ.

IV.

The questions of gravity involved in the case at bar, are:
(a) That the said suit and decision involves the question of interference by the U. S. Courts by injunction with the State in the collection of its revenue and actually deprives the State in this particular case of the sum of $150,000.00 or other large sum; besides, a similar suit is pending, awaiting the determination of this suit, for the collection of a similar amount of taxes on the other fifteen thousand shares of stock in the Western Railway of Alabama, held and owned by the Central of Georgia Railway Company, referred to in Paragraph 4 of the petition for this writ;

(*b*) That said decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Georgia bearing upon the point at issue, interpreting that provision of the Constitution of 1877, declaring what property shall be taxed, and what property shall be exempt from taxation;

(*c*) That the said decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the State of Georgia and of the United States in holding that shares of stock in a corporation are not property subject to taxation, but mere symbols of property;

(*d*) That the said decision was based upon the supposed authority in the case of Wright, Comptroller General, vs. Southwestern R. R. Co., reported in 64 Ga., 783 at 799, which was rendered under the Constitution of 1868, and is no longer authority under the present Constitution of 1877 and laws passed thereunder, as interpreted by the later decisions of the Supreme Court of Georgia cited in Petitioner's main brief.

Respectfully submitted,

BOYKIN WRIGHT,

JOHN C. HART,

Solicitors.

Office Supreme Court U. S.
FILED
MAR 24 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

9,304 20

WILLIAM A. WRIGHT, Comptroller General, *Petitioner*,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO., and THE ATLANTIC COAST LINE RAILROAD CO., *Respondents*.

No.—
Petition on Equity for Writ of Certiorari.

Brief of BOYKIN WRIGHT and JNO. C. HART,
Solicitors for Petitioner.

BYRNES-TABORIAN, STEPHENSON AND PRESTON, PRINTERS, RICHMOND, VA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia, *Petitioner*, vs. THE LOUISVILLE & NASHVILLE RAILROAD CO., and THE ATLANTIC COAST LINE RAILROAD CO., *Respondents*.

No. —.
Petition for Writ of Certiorari under Section 6 of the Act of March 3rd, 1891.

Brief of BOYKIN WRIGHT and JOHN C. HART,
Solicitors for Petitioner.

STATEMENT.

This was a bill filed in the Circuit Court of the United States for the Northern District of Georgia, by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, against William A. Wright, Comptroller General, to enjoin the latter from collecting from the Georgia Railroad & Banking Company, State taxes on certain shares of stock in the Western Railway of Alabama, complainants being the Lessees of the Georgia Railroad and liable under the terms of the Lease for taxes assessed against the Lessor.

The Lease was for ninety-nine (99) years from the first day of April, 1881.

Among the properties leased by the Georgia Railroad & Banking Company was its interest in the Western Railway of Alabama, which at the time of the Lease, was jointly owned by the Georgia Railroad & Banking Company and the Central Railroad & Banking Company, as tenants in common, each of said Companies owning one-half undivided interest therein. For copy Lease see Record, p. 22.

Subsequent to the Lease the owners of the Western Railway of Alabama, viz: the Georgia Railroad & Banking Company, and the Central Railroad & Banking Company, had the same incorporated under the laws of Alabama as provided for in the Lease, with a capitalization of $3,000,000.00, divided into thirty thousand shares of stock, fifteen

thousand to the Georgia Railroad & Banking Company, and fifteen thousand to the Central Railroad & Banking Company. These fifteen thousand shares of stock have been held ever since, and are still held by the Georgia Railroad & Banking Company in the State of Georgia, the income of which, however, is paid over annually to the Lessees. The Georgia Railroad & Banking Company executed to the Lessees a Power of Attorney to vote said stock at the Stockholders' Meeting.

These fifteen thousand shares of stock are the property which the Comptroller General claims is subject to taxation. The object of the Bill was to enjoin the collection of this tax on the ground that there is no law authorizing the taxation of shares of stock held by a resident owner in a foreign corporation. An agreed statement of facts was entered into by the parties in writing and filed with the record in the case, to which reference is here made. An Answer was also filed in which a Demurrer was set up and a Motion to Dismiss the Bill, for want of equity, and because complainants had no such interest in the matter complained of as entitled them to maintain the Bill; the point being that the Georgia Railroad & Banking Company and not Lessees were the proper parties to bring this Bill, if maintainable at all.

There being no controversy as to the facts there were presented to the Court but two questions:

(1) Did the complainants have such interest in the matter complained of as to entitle them to maintain said Bill and such equity as to entitle them to relief by injunction?

(2) Whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad & Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia?

Judge Newman decided both of these questions in favor of the complainants in the Bill, and granted an injunction against William A. Wright, Comptroller General, perpetually enjoining him from issuing any execution or taking any steps to collect the taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Judge Newman in his opinion stated the issue as follows:

"It may be conceded first, as a general proposition, that the State has the power to treat shares in a corporation as distinct and separate property in the hands of the holders, should it desire to do so, for purpose of taxation; and further, if suitable legislation is enacted, it may carry out this purpose. This is supported by abundant authority, and is not questioned, as I understand, by counsel for the complainants in this case. Cook on Stock and Stockholders, Sec. 563; Tennessee v. Whitworth, 117 U. S. 129. Conceding this to be true, however, the real contention of counsel for complainants here is that the State of Georgia has not adopted this policy, and that the action of the Comptroller General in attempting to tax these shares is without authority of law."

See Record at p. 14.

SPECIFICATION OF ERRORS.

The Specifications of Errors set forth in the Circuit Court of Appeals were as follows:

First. That the Court erred in not sustaining defendant's demurrer to the bill, set up by way of answer, and dismissing the said bill, because:

(a) The complainants did not make such a case as entitled them in a Court of Equity to any relief from or against the defendants touching the matters contained in said bill, or any of such matters.

(b) Because there was no equity in said bill.

(c) Because complainants had no such interest in the matters complained of as to entitle them to maintain said bill, and to entitle them to relief by injunction.

Second. Because the Court erred in granting the injunction against William A. Wright, Comptroller General, perpetually enjoining him from issuing any execution or taking any steps to collect taxes upon the shares of stock in the Western Railway of Alabama held by the Georgia Railroad & Banking Company in the State of Georgia.

Third. Because the Court erred in granting the injunction against the Georgia Railroad & Banking Company, enjoining it from making any return of the shares of stock of the Western Railway of Alabama held by it, in the State of Georgia, for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed in the State of Georgia.

Fourth. Because the Court erred in holding and decreeing, "under the laws of the State of Georgia, and the decisions of its Courts, shares of railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia," and in not holding and decreeing to the contrary.

Fifth. Because the Court erred, under the facts and circumstances of the case, in holding and decreeing "that the said William A. Wright, Comptroller General, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as Comptroller General so to do," and in not holding and decreeing to the contrary.

The Circuit Court of Appeals affirmed Judge Newman's decision generally but filed no opinion

THE PETITION FOR WRIT OF CERTIORARI.

The Comptroller General of Georgia now files his petition to the Supreme Court of the United States for a writ of certiorari under Section 6 of the Act of March 3, 1891, requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court for its review and determination the said case, it being No. 1156 in the Circuit Court of Appeals, and specifies as errors of said Circuit Court of Appeals the same errors as above set forth; and in addition, stating the

following grounds why said writ of certiorari should be granted by this Court, to wit:

That the questions involved in said suit are of gravity and importance, in this:

(1) That the said suit and decision involved the question of interference by the United States Court by injunction with the State in the collection of its revenue and deprived the State in this particular case of the sum of $150,000.00, or other large sum.

(2) That said decision is in conflict with the decisions of the Supreme Court of Georgia interpreting that provision of the Constitution of 1877, declaring what property shall be taxed, and what property shall be exempt from taxation, the conflict being in this:

(a) That the said decision of the Circuit Court of Appeals for the Fifth Circuit holds that shares of stock in a foreign railroad are not property subject to taxation here, but mere representations or symbols of property, the only substantial property being that of the Railroad Company itself in the State where said railroad is located.

(b) That the said decision of the Circuit Court of Appeals in affirming the decision of the Circuit Court holds that the General Assembly of Georgia has the power to declare whether or not shares of stock in a foreign railroad or in any railroad shall be deemed and treated as property subject to taxation, whereas the Supreme Court of Georgia has distinctly held in several decisions to the contrary; and declared that the Legislature since the Constitution of 1877 has no power to classify subjects of taxation but that the said Constitution alone does this and forbids the Legislature from undertaking to classify subjects of taxation or to exempt any property not specifically exempted by that Constitution.

(c) The contention of the State of Georgia in this case is that since the Constitution of 1877, as interpreted by the Supreme Court of Georgia, all property not exempt by that Constitution is taxed, and that the Legislature not only has not exempted, but cannot exempt any item of property not specifically mentioned as exempt in that Constitution; and that inasmuch as shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself, these shares are taxable to the owner at its domicile.

(3) That the questions involved in said suit are of further gravity and importance in this, to-wit:

That the said decision of the Circuit Court of Appeals in holding that shares of stock in a corporation are not property but mere symbols of property is in conflict with the decisions of other Circuit Courts of Appeals and of the Supreme Court of the United States, and for this reason this Honorable Court should require the said case to be certified to it for review and determination, under and in conformity with the provisions of the said sixth section of the Act of Congress of March 3rd, 1891.

(4) That the questions involved in said suit are of further gravity and importance in this, to-wit:

That the said case was decided in the said Circuit Court of Appeals as well as in the Circuit Court upon the supposed authority of the decision of the Supreme Court of Georgia in the case of Wright, Comptroller General, v. Southwestern Railroad Company, reported in 64 Ga., 783, at 799.

Judge Newman rendering the opinion of the Circuit Court conceded that the State had the power to treat shares of stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783.

That decision is put on the theory that stock in a railroad is but so many shares of its property simply symbols or representations of the corporate property; and is contrary to the great weight of authority defining what a share is.

The said decision in 64 Ga., 783; was rendered under the Constitution of 1868 when the Legislature had the power to exempt from taxation any property either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga,, 80; (h. n. 1.)

But by the Constitution of 1877 the power to "exempt from taxation was taken away from the Legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80; (h. n. 2.)

Besides, when the decision in 64 Ga., was rendered there was no law requiring shares of stock in a foreign corporation to be returned for taxation as is now required by the Tax Act of 1898, and by the Acts of 1884–5, pages 28 and 30.

BRIEF OF ARGUMENT.

I.

COMPLAINANTS IN THE ORIGINAL BILL HAVE NO INTEREST AND NO EQUITY ENTITLING THEM TO RELIEF BY INJUNCTION.

After stating the fact of Lease and plaintiffs succession to the leasehold interest plaintiffs state their grounds for equitable relief in Section 13 to 19, both inclusive, of their Bill.

See p. 5 and 6 of Record.

It will be seen that it is not alleged that any tax or tax execution is *threatened* even against plaintiffs themselves, or their property. The demand for taxes on these shares is made upon the owner, the Georgia Railroad & Banking Company, and the levy and sale apprehended, is with respect to property of the Georgia Railroad & Banking Company.

Plaintiffs seek to connect themselves with the matter and to obtain a status in Court by showing that their leasehold interest might be effected if the threat were carried out.

It may be conceded that under the terms of the Lease, as between the Lessor and the Lessee, the Lessee by private covenant is obliged to pay these taxes, if legal.

But this private agreement between Lessor and Lessee does not affect the State's right to look to the real owner—Lessor—for its taxes, leaving the Lessor and the Lessee to adjust between themselves their respective rights under the Lease. Even if the State had the right to look to Lessees for the taxes it was not seeking to do so.

Plaintiffs allege that the demand for taxes is made on the Georgia Railroad & Banking Company and it is about voluntarily to return these taxes and pay them, they being illegal.

If so, how can that hurt plaintiffs?

Plaintiffs are liable to Lessor only for *legal* taxes, that is such as are collectible by law.

But plaintiffs say they are afraid the Georgia Railroad & Banking Company will voluntarily return the property for taxes and then allow the same to be collected by sale of the leased property, to the possession of which plaintiffs are entitled.

What reason have plaintiffs to apprehend that the Georgia Railroad & Banking Company would see their property thus sacrified to the payment of an illegal tax, and its interest therein lost forever?

None is stated in the Bill. Such an apprehension in baseless and does not furnish any sufficient ground to uphold an injunction by a Federal Court against the collection of a State's revenue.

The Court will not assume that the Georgia Railroad & Banking Company will do a foolish or senseless thing to its own hurt.

Besides, if the Georgia Railroad & Banking Company pays the tax it could not recover the same from complainants, if illegal; if it refuses

to pay and resists the payment the State could not collect the tax if illegal. How, therefore, could complainants be hurt in either event?

But would the Georgia Railroad & Banking Company either voluntarily pay an illegal tax or suffer its property to be sold to pay an illegal tax?

Will this Court exercise its extraordinary power of injunction and enjoin a sovereign State's taxes on the assumption that the Georgia Railroad & Banking Company will do such a foolish and such an unreasonable thing?

If the tax is illegal, of course, the Georgia Railroad & Banking Company will resist it by its proper remedies, either at law or in equity. It would have every reason of self-protection to do so.

Will this Court allow plaintiffs to litigate for and in behalf of the Georgia Railroad & Banking Company on the bare assumption that the Georgia Railroad & Banking Company will not litigate for itself and protect its own rights, simply because, under a lease contract with the Georgia Railroad & Banking Company, the Lessee has covenanted with the Lessor to be responsible for the taxes. Why should the State be thus forced to litigate with strangers in collecting taxes due by its own citizens?

Besides, the Georgia Railroad & Banking Company as Lessor is bound to protect Lessee in the undisturbed possession of the leased property, and should it fail to do so by allowing any portion of it to be seized to pay an illegal tax, the Georgia Railroad & Banking Company is solvent and amply able to respond to plaintiffs in a suit to enforce their rights under the Lease.

As was said in Shelton v. Platt, 139 U. S., 591:

"Irreparable injury is the sole ground upon which jurisdiction in equity can be regarded as invoked in this case. * * * * So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the Express Company to pay the amount of the tax as claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature *irremediable*. The bill showed the Company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy."

139 U. S., 591, et seq.

THE LAW BEARING ON THIS POINT:

A threat to levy a tax execution does not amount even to duress, and a payment under such a threat would be purely voluntary.

Hoke v. Atlanta, 107 Ga., 416.

The plaintiffs in this case are merely intermeddlers.

See Zachry v. Zachry ,68 Ga., 158;
McPhee v. Veal, 76 Ga., 656;
Picquet v. Augusta, 64 Ga., 254;
Southwestern R. Co. case, 64 Ga., at 897.

In the last named case the Court say that the S. W. R. Co. could not enjoin tax execution issued against its dependent line, the Fort Valley & Hawkinsville Co. The latter Railroad Company alone could maintain such a bill.

64 Ga., at top 797.

In Missouri River, etc., R. Co., v. Wheaton 7 Kan. 232, the syllabus is as follows:

"A person against whom no illegal tax has been assessed or levied upon, cannot, by injunction, restrain the collection of an illegal tax against another person."

7 Kan. 232.

In the same case the Court says:

"Can A. against whom no illegal tax has been assessed, maintain an action against the officers of Bourbon County, because they have assessed an illegal tax against B? We answer this question in the negative, and without any comment proceed to the next question."

Missouri River, etc. R. Co. v. Wheaton, 7 Kan. 232.

A stipulation by Lessee to pay taxes obligates him to pay only valid taxes; if Lessor paid or suffered to be collected out of its property illegal taxes plaintiffs would not be liable.

Clark v. Coolidge, 8 Kan. 189;
Bristol v. Hammacher 30 N. Y. Misc. 426.

Even if Lessor paid such a tax under duress plaintiff would not be liable

Kimball v. Corn Ex. Nat. Bank. 1 Ill. App. 209-217.

A single suit would determine once and forever the taxability of these shares; hence multiplicity can furnish no ground for equity.

Johnston v. Stone, 71 Miss., 593.
People's Nat. Bank v. Marye, 107 Fed. R. 570 at 577;
Bouton v. City of Brooklyn, 15 Barb. (N. Y.) 375.

FEDERAL COURTS OF EQUITY RELUCTANT TO ENJOIN COLLECTION OF A STATE'S REVENUE.

In the case above cited of People's Nat. Bank v. Marye 107 Fed. R., 570, Judge Waddill says:

"Courts of Equity are seldom called upon to exercise a more delicate power than that of granting injunctions to enjoin the collection of a State's revenue. Such power on the part of Courts is expressly inhibited by the federal statutes as to taxes due the United States, and federal courts should proceed with great caution in exercising such power as to taxes due the State. It is a prerogative the exercise of which may result in great harm, and only where the right is clear, the necessity for action urgent, and the inadequacy of any other remedy apparent, should a Court of Equity interpose. The Supreme Court of

the United States, in Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 37, 19 Sup. Ct. 90, 92, 43 L. Ed. 354, 356, speaking through Mr. Justice Gray, said :

" 'The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States unless it clearly appears not only that the tax is illegal but that the *owner* of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction.'

"In Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65, a citizen of the State of New York, owning shares in a national bank doing business in the city of Chicago, sought by bill in equity to enjoin the collection of a tax assessed by the city of Chicago upon its shares, for the reason, among others, that the tax was unconstitutional and void, because not equal and uniform, as required by the constitution of the State, and because, such shares also were not taxable by the City at the domicile of the defendant. The Supreme Court, through Mr. Justice Field, at page 112, 11 Wall., and at page 66, 20 L. Ed , said :

" 'Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a Court of Equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatenad injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked.'

" 'In the State Railroad Tax Cases, 92 U. S.. 575, 613, 615, 23 L. Ed., 669, 674, Mr. Justice Miller speaking for the Supreme Court, after stating that it had been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularily, of itself, gave the right of injunction in a Court of Equity, said :

" 'We do not propose to lay down in these cases any absolute limitation of the powers of a Court of Equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisprudence, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a Court of Equity to interpose by injunction to stay the collection of a tax.'

"It is well settled that a suit to enjoin the collection of a tax will not be entertained in Courts of Equity—at least in those of the United States—in which the sole ground set forth in the bill is that the tax is illegal or excessive. It must appear in addition that the circumstances make the wrong about to be inflicted of such a peculiar character that the remedies in a court of law are inadequate, and so bring the case under some recognized head of Equity jurisdiction."

Per Taft, C. J. in Taylor v. Louisville, etc., R. Co. (C. C. A.) 88 Fed. R. 350, 357, citing the following cases:

Ogden City v. Armstrong, 168 U. S., 224, 236;
Express Co., v. Siebert, 142 U. S., 339;
Allen v. Car Co., 139 U. S., 391;
Railway Co. v. Cheyenne, 113 U. S., 516, 525;
Hennewinkle v. Georgetown, 15 Wall, (U. S.) 547;
Dows v. City of Chicago, 11 Wall. (U. S.) 108.

In Lumber Co. v. Town of Hayward, 20 Fed. R., 422, 425, Bunn, J. said:

"I am aware that some of the State Courts, particularly in Illinois, have gone a considerable way in the direction of allowing an injunction to restrain the collection of a tax. But we have seen and may see further by a reference to the decisions, what is the attitude of the general government, legislative and judicial upon this subject. And the general doctrine holds good by the weight of authority, state and national, that equity will not interfere except in special cases, as of fraud, to save a multiplicity of suits, or prevent irreparable injury or a cloud upon title to land."

In Pacific Express Co. v. Siebert, 142 U. S., 339, 348, Mr. Justice Lamar, in discussing equity jurisdiction to restrain collection of taxes said:

"When the illegality of the tax or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further, and make out a case that can be brought under some recognized head of equity jurisdiction."

Judge Newman says:

"Under the Georgia law, where tax is sought to be collected without legal authority, an injunction is the proper remedy. 64 Ga. 783-801; 71 Ga. 24-30; 85 Ga. 647-650; 107 Ga. 384.

"The same relief may be granted in the United States Courts as in a State Court, if the citizenship is proper."

154 U. S. 362-391;
168 U. S. 611-613:"

Concede that under our State's decisions the Georgia Railroad & Banking Company, of whom alone the tax is demanded, could maintain the bill, what possible equity have the complainants from whom the Comptroller General claims no tax? If there is no law for the tax, why shall not the Georgia Railroad & Banking Company enjoin or resist it; if it pays the tax, it could not recover the same from the complainants; if it refuses to pay and resists, the State cannot collect it, if illegal.

The cases relied on are not in point.

The point is not that the Georgia Railroad & Banking Company might not, if citizenship were proper, maintain such a bill, but that these complainants are not in a position to do so. They can show no equity, because they have no interests that will suffer by the acts

claimed to be apprehended. If the tax demanded of the Georgia Railroad & Banking Company is without authority of law, the complainants have only to remain quiescent. In no event will they have it to pay.

II.

TAXATION OF THE SHAREHOLDER IN CORPORATIONS.

"Shares of stock in a corporation held by any person are taxable as such notwithstanding the fact that the corporation itself has paid a tax on its property, or its capital stock or both."

25 Ency. of Law, p. 662;
1 Ta lor on Private Corporations (2nd Ed.) 477 Sec.
Desty on Taxation (1st Ed.) Vol. 1, p., 356;
109 Ga., at 69 and 72;
State Bank v. Richmond, 79 Va., 113;
Memphis v. Ensley, 32 Am. R., 532;
Cook v. Burlington, 44 Am. R., 679;
Seward v. Rising Sun, 79 Ind., 353, reported in 13 Am. & Eng. R. Cas., 315

This is true because the "capital stock" and the "shares" are distinct properties.

25 Ency. Law, 663;
94 Ga., (201) 202;
136 U. S., 549 (Law Ed.) 527;
109 Ga., 63 at 69 and 72;
70 U. S., 573-584;
85 U. S., 206-230;
117 U. S., 129;
119 U. S., 265;
Cleveland Trust Co. v. Lander U. S. Sup. Ct. Oct. Term, 1901, decided April 1, 1902;
Van Allen v. Assessors, 3 Wall, 573.

In the case last above named Mr. Justice Nelson of the Supreme Court of the United States says:

'The tax on the shares is not a tax on the capital of the Bank. The corporation is the legal owner of all the property of the Bank, real and personal * * * * The interest of the shareholder entitles him to participate in the net profits earned by the Bank in the employment of its capital, during the existence of its charter, in proportion to the number of shares * * * * This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him."

3 Wall (U. S.) at page 583;
Read 136 U. S., 459 (Law Ed.) 527 1st column and citations.

To the same effect as above:

Burroughs on Taxation (1st Ed.) Sec. 86;
Cook on Stock and Stockholders and Corp. Law (2nd Ed.) Sec. 563-565;

Bradley v. Bauder, 36 O. St., 28, reported in 38 Am. R., 547;
Porter v. Rockford, etc. R. Co., 76 Ill.. 561;
Danville Bank, etc. Co. v. Parks, 88 Ill., 170;
State v. Branin, 23 N. J. L., 484;
Minot v. Philadelphia, etc R. Co., 18 Wall. 206;
Commonwealth v. Delaware Division Canal Co., 2 L. R. A. 798, notes;
New Orleans v, Hous on, 119 U. S., 265;
44 Am. R , 679;
136 U. S. (Law Ed.) 527 1st column and citations.

TAXATION OF SHAREHOLDERS IN FOREIGN CORPORATIONS:

"A tax may be levied on shares of stock in foreign corporations, by the State of the owner's residence. This rule is not affected by the fact that the corporation has in its State paid taxes on capital stock or property or both."

Fied v. Ala., 1888 U.S. 78

24 Ency. of Law, pages 663, 664;
Sturgis v. Treasurer, 114 U. S., 511;
Worthington v. Sebastian, 25 Ohio State, 1;
McKeen v. Northampton, 49 Pa St., 519, reported in 88 Am. D., 515;
Worth v. Ashe Co., 82 N. C., 420, reported in 33 Am. R., 692; also 688;
State v. Branin, N. J. L., 484;
State v. Bentley, 23 N. J. L., 532;
Newark City Bank v. Assessor, 30 N. J. L., 13;
Seward v. Rising Sun, 79 Ind., 351, reported in 13 Am. & Eng. R. Cas. 315.

In the last above cited case the Court said: (a case distinctly in point) "There is no provision in our statutes, which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations * * * In the absence of any statute to the contrary, although a corporation may be taxable for its corporate property, the owner of shares of its stock may be taxed therefor where they reside."

13 Am. & Eng. R. Cas., 315.

This was upheld on the idea merely that "stock was personal property." There was no statute law declaring stock to be property. There was not even a question to the tax payer for listing "stock in foreign corporations." (See page 316.) It merely relieved shares in domestic corporations.

To the same effect:

Dwight v. Mayor, etc., of Boston, 12 Allen (Mass.) 316, reported in 9 Am. D., 149;
Dyer v. Osborne, 11 R. I. 321, reported in 23 Am. R., 460:
Bradley v. Bauder, 36 O. St., 28, reported in 38 Am. R., 547;
Appeal Tax Court v. Gill, 50 Maryland, 377.

In Dyer v. Osborne, above cited, Chief Justice Durfee said:

"The laws of *Rhode Island* are paramount in *Rhode Island* and all inhabitants of the State are subject to them without regard to the laws of any other State. * * * * It would certainly be going too far to hold that a man of wealth in *Rhode Island* cannot be taxed at all, if his property invested in the stocks of a manufacturing corporation of another State and there subject to taxation."

Ib.

23 Am. R., 460;

See, Worth v. Ashe Co., 90 N. C., 409.

"Certificates of stock of a foreign corporation held by a citizen of Ohio are taxable in that State, though a tax is also imposed on the property of such corporation situated in the State."

Sturgis v. Merchant Carter Treasurer, 114 U. S., 511 h. n. 4. (Law. Ed.) 240.

In the last above cited case the Western Union Telegraph Company was taxed upon such of its telegraph lines and property as were located in the State of Ohio; yet the Court held that a shareholder in the W. U. T. Company, residing in Ohio, was properly taxed upon his shares in the Telegraph Company, notwithstanding that the Telegraph Company was taxed upon its entire capital stock in the State of its incorporation, and also upon that portion of its property located in the State of Ohio.

114 U. S., 511.

But it is not denied by counsel for the Railroads that the foregoing is the general law. They admit that the authorities sustain taxing stock and property it represents as distinct properties assessable against separate and distinct owners.

They admit that Georgia *might* treat each as taxable property.

But they contend:

(1) That to tax the shares of the stockholders and the property of the corporation is double taxation, and hence the authority to so tax must be expressly given or necessarily implied by the tax act;

(2) That there is no express law, in Georgia, requiring a resident shareholder in a foreign corporation to pay taxes on his shares;

(3) That the law of Georgia has fixed the situs of shares of stock in a foreign corporation at the domicile of the corporation, and not at the domicile of the shareholder.

III.

NO DOUBLE TAXATION.

Taxing shares of stockholders and also property of corporation, not generally regarded as double taxation, because they are different properties and assessed against different owners.

25 Am. & Eng. Ency of Law, pages 666, at 670, citing many authorities;

95 U. S., 679–687;

114 U. S., 511 (Law. Ed.) 244.

In 95 U. S., 679–687, the Supreme Court of the United States, say: "The capital stock and the shares may both be taxed, and it is not double taxation."

95 U. S., 679–687 (Law. Ed.) at 560.

"Double taxation in a legal sense does not exist unless double tax is levied upon the *same property* within the *same jurisdiction*."

Bradley v. Bauder, 36 Ohio St., pages 28–29, reported in 38 Am. R., at 548.

"The laws of the State of Ohio are not material. Where property is taxable by the laws of this State (Ind.) it is immaterial how much it is taxed elsewhere."

Seward v. Rising Sun, 13 Am. and Eng. R. R. Cas., at 316 (79 Ind. 353)

"Power to tax shares of stock, owned by our citizens in corporation located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same whether the capital of the corporation is there taxed or not; otherwise the power of taxation conferred by the Constitution would be made to depend upon the operation of the laws of a foreign jurisdiction—a proposition so obviously ill-founded that the moment it is stated its falsity becomes apparent."

36 Ohio St, 28, et seq., reported in 38 Am. R. at 549 and 550.

"The owner of a share of stock owns no part of the capital of the Company. The stock is personal property, which upon the death of the owner goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and in so doing works no change or modification in the title to the corporate property. From this it would seem to result necessarily that its *situs* for purposes of taxation, when not otherwise provided by statute, is that of the domicile of the owner."

Badley vs. Bauder, 36 Ohio St., 28 et Seq., reported in 38 Am. R., 549.

The injustice which sovereignties generally seek to avoid is "double taxation" by the *same sovereign*.

Manifestly this principle cannot be applied as between *different sovereigns*.

Such a rule would operate in a way to deprive one State of its right to tax because some other State may have wrongly attempted to tax the same property.

If no double taxation, then there is no room for the rule of construction insisted upon applicable only in cases of double taxation.

In a learned note on this subject in 13 Am. and Eng. R Cases, at page 319, the following is stated as the result or conclusion of the law on this point, viz;

"The conclusion at which we have arrived may be thus summed up: a holder of stock in a foreign corporation is liable to be taxed on such stock in the State where he is domiciled.

The capital stock itself may also be taxed in the foreign State which is the domicile of the corportion.

The presumption is that the intention of the law was not to impose the latter tax. Clear and indisputable language must be used to overcome this presumption."

13 Am. & Eng. R. Cases, at page 319.

The above case held:

"That shares of stock in incorporated companies (foreign), whether the property of such companies be tangible or intangible are personal property;" and are taxable at the domicile of the owner.

13 Am. & Eng. R. R. Cases, at 315.

THERE IS NO OPPRESSION OR TYRANNY INVOLVED IN THIS TAXATION. It was claimed, with some degree of fervor and heat, by counsel for the Railroads that for the State to tax these shares when the property of the corporation was taxed in Alabama, would be *oppressive* and *tyranical*. Not so. The right to tax is not based upon a mere fiction or technicality of the law, but upon the substantial consideration that both the owner and his property in the shares enjoy the protection and benefit of the laws of this State and should on that account contribute their pro rata to the support of the Government. This view is ably stated *in re* Greenleaf (Ill.) 56 Northeastern Rep, at page 296.

In the above case the Supreme Court of Illinois declare:

"The shares of stock in the Kansas corporation held and owned by appellant are property within the jurisdiction of this State. They may be the subject of contracts of sale, barter or exchange under our laws; and the power of our laws may be invoked to enforce or defend such contract, and also to protect the property interest of Appellant in them against force, fraud, or theft. He is a resident of the State, and is entitled to invoke the authority of the State and the aid of our Courts to protect his property, including these shares of stock * * * * If the stock be not assessed for taxation, he will enjoy the benefits of the organized power of the State for the protection of his property rights and interest therein without being required to contribute to the support of the State Government in proportion as he enjoys its advantages and protection."

In Re Greenleaf, 56 Northeastern Rep., at page 296.

IV.

UNDER THE LAWS OF GEORGIA SHARES OF STOCK ARE TREATED AS PERSONAL PROPERTY AND SUBJECT TO TAXATION.

The lawyers for the Railroad Company and Judge Newman conceded that the State has the *power* to treat shares of stock as distinct and separate property for purposes of taxation, but say that the State of Georgia has not adopted this policy. Let us see:

The Constitution of Georgia prescribes an *ad valorem* tax on *all* property subject to taxation.

Section 5883 Georgia Code.

All property in the State divided in two classess only—that subject and that not subject to taxation.

82 Ga , 138.

84 Ga., 683.

Shares of stock in railroad companies not included in the exemptions authorized by the Constitution.

Georgia Code 5884, 5886.

Shares of stock in Georgia are personal property.

Georgia Code, Sec. 3070.

"Shares of stock in railroad companies shall be *deemed personal property.*"

Sec. 2165 of the Code;

40 Ga , 408 ;

94 Ga., 201 202 ;

109 Ga., 69-72 .

"All stocks and securities whether in corporations within this State or in other States" shall be construed to be personal property for purposes of taxation.

Acts 1884-5, p. 28-30.

Shares of stock separate property from property of corporation.

94 Ga., 201-202 ;

58 Ga., 190 ;

95 U. S., 679 ;

96 U. S 193 ;

109 Ga., 69-72.

The Legislature has no power to classify subjects of taxation. This our Constitution forbids when applied to property. The Constitution alone does this.

109 Ga., 70.

The decision in 109 Ga., at 72, distinctly declares that shares do not represent the property of the corporation, and that tax on the shares are a direct tax on property, viz., the property of the shareholder and not the property of the corporation.

109 Ga., at 72 and top of page 73.

To the same effect 109 Ga., page 80, et seq.

Any property which claims exemption must show express authority for said exemption.

104 Ga., at 297.

113 Ga., 883, at 885

74 Ga., 413.

Sturgis v. Carter, 114 U. S., 511.

Railroad companies are required to return each "class or species of property"—all property—to be "taxed as other property of the people of this State."

Code Sec. 780.

Likewise ordinary tax-payers are required to return specifically all property, including obligations for money, etc., whether the same are within or without the State.

Code Sec. 833.

The question then resolves itself into a simple one, viz: Are railroad shares "property;" if so and not exempt, the laws of Georgia tax them.

Code Secs. 780-833.

But the very tax act under which these taxes are claimed, *expressly* requires the shares of stock in a foreign corporation to be returned for taxation by the tax-payer, under oath.

Acts of 1898, page 36, Sec. 16, Par. 30, 31 and 32.

Also in this very Act the Legislature *recognizes* "stocks" as *property to be taxed*, in requiring "that the Agent in this State, or any person, firm or corporation, resident without this State, who shall have on hand for sale, storage, or otherwise, as such Agent, any merchandise or other property including money, notes, accounts bonds *stocks*, etc., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property of the State is taxed."

Acts of 1898, page 29.

Also the Act of 1884, p. 28-30, declares: "all stocks and securities whether in corporations within this State or in other States" to be personal property "for purposes of taxation."

Act 1884-5, p. 28-30.

In Georgia the Constitution classifies the subjects of taxation. The Legislature has nothing to do with it. By the Constitution all property is taxed, except religious, charitable, public or educational property.

109 Ga., 68 and 70.

But if the legislative intent be considered of importance, how could that intention be made more manifest than in the said Act of 1898 and in said Act of 1884-5, p 28-30.

V

IT IS NOT NECESSARY THAT THE TAXING LAW SHOULD SPECIFY A PARTICULAR ITEM OF PROPERTY FOR TAXATION; IT IS ENOUGH IF IT COMES WITHIN THE CLASS OF PROPERTY MADE TAXABLE.

A tax upon "shares of stock" has been repeatedly upheld upon such general provisions of the law as provide for the taxation of "personalty" or "personal property," or "all property" not exempt.

See Seward v. Rising Sun, 79 Ind., 351, reported in:

13 Am. & Eng. R. Cases, 315, 316;

Dyer v. Osborne, 11 R. I., 321, reported in 23 Am. Rep., 460;

Dwight v. Mayor of Boston, 12 Allen, 316, reported in 90 Am. Dec., 149;

McKeen v. County of Northampton, 49 Pa. St., 519, reported in 88 Am. Dec., 515.

In Seward v. Rising Sun, cited above, the law simply provided a tax "upon all personal property" owned by persons residing in this State, etc., the Court held that the "shares of stock in incorporated com-

panies, whether the property of such companies be tangible or intangible, are personal property. Cooley on Taxation 16, 2 Kent. Com. 340, note," and, therefore, taxable under this provision.

13 Am. & Eng. R. Cases 315, 316.

In Dyer v Osborne, the law under which the shares of a resident stockholder in a foreign corporation was taxed, declared merely "That all real property in the State and all personal property belonging to the inhabitants thereof shall be liable to taxation unless otherwise specially provided." Section 10 of Chapter 39, declared as our Code declares, that "personal property" included stocks or shares in corporations not exempted from taxation.

23 Am. Rep. 461.

On this general provision, the Court held:

"The owner of shares of stock in a foreign corporation, is liable to taxation thereon in the State where he resides, although he has paid tax thereon in the State where the corporation is located."

23 Am. R. 460.

Likewise in Dwight v. Mayor of Boston, the shares in foreign corporation were taxed merely under the law taxing "all personal estate," the Court holding that as such they were taxable in the place where the owner resides.

90 Am. Dec., at 149.

Likewise, in McKeen v. County of Northampton, "shares of stock" were subjected merely under the general law taxing "personal property," the Court holding:

"The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him and when he dies, his domicile governs its succession. It goes to his executor or administrator, and not to the heirs, and is carried into the inventory of his personal effects * * * * Its ownership has its legal *situs* at the domicile of the owner."

88 Am. Dec., at 516 and 517.

We insist that the Tax Act of 1898 specifically requires the return of these shares for taxation but the foregoing decisions are cited to the point that such specification is not necessary since the Constitution of 1877 requires *all* property to be returned for taxation, except that which it specifically exempts, and the Code and the Act of 1884–5, p. 28–30, and the late decisions of our Supreme Court declare shares of stock to be personal property and separate and distinct from the property of the corporation.

Code §3070, 2165; 109 Ga 72.

94 Ga. 202.

109 Ga. 80.

The Supreme Court of Georgia in its very latest deliverance on this subject in 109 Ga., at pages 96 and 97 has declared in language that is unmistakable what property the Constitution taxes, as follows:

"The language would seem to be plain, its purpose unmistakable, to require all property to be taxed not only uniformly, but ad valorem. It left no loophole to escape. There was to be no classifying of prop-

erty; no exempt property except that specifically allowed to be exempted by the Constitution. The rule was absolute: Property, tax according to value."

109 Ga., at 96.

Again, in this very decision the Court declares:

"Once for all, the Constitution has enumerated the two classes of property, which enumeration the legislature, the courts, and the citizens must recognize as exhaustive; property, whatever its species, is simply exempt or subject to be taxed. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value * * * * If this is not a clear, plain and pointed statement, I despair of attempting to express the idea more strongly. If any part of the act of the Legisiature is contrary to the Constitution, that instrument in express terms provides that it shall be the duty of the courts to so declare it."

109 Ga., at 97.

VI.

SHARES OF STOCK IN FOREIGN CORPORATIONS HAVE THEIR SITUS, AND ARE TAXABLE IN THE STATE IN WHICH THE OWNER RESIDES.

That the above is true, both at common law and according to the great weight of authorities, is not denied. As stated by the Supreme Court in 18 Wallace 206, (Law Ed.), at 896, *shares of stock* are "an interest or right which accompanies the person of the owner, *having no locality independent of his domicile.*"

18 Wall, 206 (Law Ed.) at 896,
Van Allen v. Assessors, 3 Wallace, 583;
Union Bank v. State, 9 Yerg, 501;
Bradley v. Bauder, 36 Ohio St., 28, reported in
38 Am. Rep., at 549;
Cooley on Taxation, 16;
Burroughs on Taxation, 188;
Cook on Stock and Stockholders (3rd Ed.) Sec. 566, note 2nd col.
McKeen v. County (Pa.) 88 Am. Dec., at 517.
Belo v. Commissioners, 82 N. C., 415, reported in
33 Am. Rep., at 690;
In Re Greenleaf, 56 Northeastern Rep. (Ill. Feb. 1900), at page 295 and 296;
State v. Kidd, 28 Southern Rep. (Ala.) 480;
See, Notes 56 Am. Dec., at page 528.

Of course the State of Alabama could not fix the *situs* of shares of stock held in Georgia by citizens of this State.

"One State cannot impair another's right to tax property within its limits."

See, 56 Am. Dec.; notes at page 528;
Appeal Tax Court v. Patterson, 50 Maryland, 354;
Seward v. Rising Sun, 13 Am. & Eng. R. Cases, at 316, where the Court holds:

"There is no provision in our Statutes (Statutes of Indiana) which relieves the owner of stock in foreign corporations from the duty of listing such property, as there is in regard to stock owned in domestic corporations. * * * * The laws of the State of Ohio are not material. Where property is taxable by the laws of *this* State it is immaterial how much it is taxed *elsewhere*."

13 Am. & Eng. R. Cases, at 316, near bottom;
36 Ohio State, 28, reported in
38 Am. Rep., at 549 and 550.

In McKeen v. County, above cited, the Court say:

"Though local authority may attach to the stock for special purposes, its *ownership* has its *legal situs at the domicile of the owner*."

88 Am. Dec., at 517.

Hence the Supreme Court of the United States in 177 U. S., 1, held that Michigan for certain special purposes could fix the situs of shares of its own corporations in that State, and sustained an action to remove the cloud upon the title to the shares of stock on the ground that said shares under the Michigan statute were located there for purposes of jurisdiction in that case.

177 U. S., 1.

While the Court seemed to express doubt as to whether Michigan could give said shares a situs for purposes of *taxation*, it never remotely hinted that said shares were not subject to taxation in Massachusetts, where the owner of some of the shares resided. This had already been settled by that high Court.

95 U. S., 679 (Law. Ed.) 558;
96 U. S., 193 (Law. Ed.) 654;
114 U. S., 511 (Law. Ed.) 244; and several later decisions.

Has the State of Georgia changed the rule and fixed the situs of shares of stock at the domicile of the corporation and not at the domicile of the owner?

Confessedly, neither the Constitution nor the General Assembly has done so. But it is claimed that this has been accomplished by certain decisions of the Supreme Court of Georgia; the one chiefly relied on being Wright, Comptroller, v. S. W. R. R. Co., 64 Ga., at 799. We will discuss this decision presently. The other decisions cited appear not to be in point. But granting that the Courts could thus fix the situs of shares without authority of the Constitution or of the Legislature, and in contravention of the established doctrine that the situs of shares of stock is at the domicile of the owner, and that 64 *Ga.*, *did so*, an entirely *different rule* has been since established by the General Assembly, and by later decisions of the Supreme Court interpreting the new system of taxation embodied in the Constitution adopted subsequent to that decision.

See, Tax Act of 1898, pages 35 and 36; Acts 1884–5, p. 28–30.
Georgia B. & L. Association v. Savannah, 109 Ga., 69, 70, 71, 72;
Atlanta, etc. Co, Stewart 109 Ga., 80 et seq.;
94 Ga., 202.

Clearly the Legislature had in mind in framing the Tax Act of 1898

the fact that many items of property subject to be taxed under the new Constitution, including shares of stock in foreign corporations, had hitherto escaped the tax officers; hence it provided as follows:

"In addition to the questions now propounded to taxpayers by the Tax Receivers, questions shall be framed by the Comptroller General to reach *all* property upon which a tax is imposed by this act, and especially the following questions: * * * How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporation located without this State? What was the gross nominal value thereof? What was the fair market value thereof?

Acts of 1898, page 35, near top, and page 36, near bottom.

Here the Legislature expressly provides the "machinery" for placing railroad shares in foreign corporations on the Tax Digest.

(109 Ga., 80, et seq.)

The law defining what property should be taxed (Consti. of Georgia; Code Sec. 5883 and Sec. 780, Vol. 1 of the Code) was already broad enough and needed no addition or revision. It was only necessary to provide the "machinery" for placing it upon the Tax Digest. This it did by the provision above quoted.

In the same Act (1898 at page 29) as we have seen, stocks of a non-resident owner held by an Agent in this State are required to be returned for taxation.

Acts of 1898, page 29.

In the light of the foregoing, and of Sections 3070 and 2165 of the Code and the Act of 1884–5, p. 28–30, declaring shares of stock to be personal property for purposes of taxation, can the Court escape the conclusion that these shares held here by the Georgia Railroad & Banking Company are taxable as property, under the Constitution and laws and decisions of this State?

ARGUMENT.

To recapitulate:

What does the law of Georgia tax? This question is answered by the Constitution of the State, which is the Supreme law. In Georgia relatively to taxation there is only one classification of property—it is either exempt from taxation or subject to be taxed and if subject to be taxed the Constitution taxes it. If exempt it pays nothing; if subject it pays according to its value.

Verdery v. Village of Summerville, 82 Ga., 138.

Under the Constitution of Georgia if property is taxed all of it must be taxed except that exempt in the Constitution. "Taxation on property must be upon all not exempted in the Constitution with a uniform rate on all kind.

Mayor v. Weed, 84 Ga., 683.

"The Constitution of the State requires that taxes on property should be ad valorem and that when any part is taxed all shall be taxed which is subject for the time being to the taxing power in the given locality. This rule is without exception."

Wells v. Mayor and Alderman, 87 Ga., 400.

In this case the Court says: "Whatever the expectation of purchasers or the unbroken practice of the City hitherto may have been the mandate of the Constitution of 1877 is to tax all property, save, that expressly exempted by the Legislature under constitutional authority, if any is taxed. That this mandate may have heretofore been disregarded is no reason why it should not be obeyed now."

87 Ga., 401-2.

See also 107 Ga., 1-5.

"When the tax officer goes forth to list property which is taxable all that which he finds employed in the ordinary uses of common life, unless it belongs to the public, he is to regard as taxable."

Mundy v. Van Hoose, 104 Ga., 300.

The Constitution of Georgia requires that all property of every kind of all persons and corporations within the territorial limits of the authority levying the tax and not exempt by the Constitution shall be taxed.

In Atlanta Nat. Assn. v. Stewart, it is held that under the Constitution of Georgia, "The General Assembly cannot lawfully either expressly exempt from taxation, or accomplish this result by failure to tax any property except that which in the Constitution itself the General Assembly is expressly authorized to exempt."

(109 Ga., 80).

As to the subjects of taxation these are fixed by the Constitution and no other law is necessary. All property in the State must pay taxes unless it is exempt by the Constitution. These shares of stock are confessedly, not exempt and if they are property in the State they are subject to taxation as all other property. The General Assembly could not relieve them by express enactment nor by failure to tax. If they are property within the State it is the mandate of the Constitution, quoting the language of the Supreme Court that they should be taxed. That they are property will not be controverted. It only remains to inquire are they property within the State.

We have seen the general rule is that stocks are personal property and have their situs with the owner.

1 Moraeritz, Sec. 224-5-6; 2 R. I. 321 (23 Am. Rep. 460).
49 Pa. St. 519 (23 Am. Rep. 465);
82 N. C. (33 Am. Rep. 688 90);
15 Wall 324;
3 Wall 584;
4 Wall 258;
18 Wall 229-30;
2nd Woods 144;
62 Am. St. Rep 458;
Code of Georgia 1895, Sec. 3070;
30 Ga., 442;
40 Ga., 408;
50 Ga., 393;

Judge Newman concedes that the State has the power to treat shares of stock as distinct and separate property for purposes of taxation, but he sustains the contention that the State has not adopted this policy and relies on 64 Ga., 783.

That decision is put on the theory that stock in a railroad is but so many shares of its property. As we have seen that theory is contrary to the great weight of authority defining what a share is.

Morawertz, Section 224-225;
69 Pa., 407;
50 Am. Rep. 131-2.
2 Woods 144;
1 Woods 18;
3 Wall 584;
18 Wall, 229-30.
94 Ga., 202.
109 Ga., 69-72.

Besides when the decision in 64 Ga., was rendered there was no law requiring shares of stock to be returned for taxation as is now required by the Tax Act of 1898.

That act requires stock issued by corporations located without the State to be returned for taxation. Why returned? The conclusion is irresistible that it was for taxation. The State could have no authority to institute such an inquisition except for taxation. Otherwise it would be not only a meaningless ceremony but an unauthorized and impertinent inquiry into the private affairs of the citizen. The Judge in the Circuit Court held that there should be a reasonably clear Legislative intent. Is not the intent of the Act of 1898 reasonably clear that the Legislature intended such shares should be returned for taxation and taxed. This provision of the act means something. If it does not mean that such shares are to be taxed what does it mean? If it does not mean this the tax payers could legally refuse to make this return. Would any Court so hold?

Certainly it cannot be maintained that the Legislature must say *in totidem verbis* that "shares of stock issued by a corporation located without the State are hereby taxed." That Act requires the taxpayers to return these shares of stock and the value on the day fixed for *the return of property for taxation.*

The legislative intent as to such shares of stock is as clear and unmistakable as to any other property to be returned for taxation. Is it not unmistakably clear under that Act that horses, mules, etc., improved city or town lots, money on hand, notes, accounts, judgments, fi. fas. against persons within or without the State, bonds issued by corporations in and out of the State and all the other property enumerated, are to be taxed? It will not be disputed that all these are to be taxed. If it is so clear as to all these, how does it become obscure or doubtful as to these shares of stock. They are all in the same Section of the same Act.

Whatever was the rule or policy of the State as declared in 64 Ga., 783, it is submitted with all confidence that the rule or policy as declared by the Act of 1898 is unmistakable that such shares of stock are to be taxed. The power to establish such rule or policy is conceded.

It is no answer to say that stockholders in other railroads do not pay a tax. It may be they should pay. But it is conceded that the State

has the right to fix a rule or policy. This being so, it could tax shares of a corporation out of the State and not tax shares of a corporation in the State—the capital stock or property being taxed. But it is said wh le the State has the power to fix such rule or poli y there "should be a clear expression of legislative intent." Has there not been such an expression? The Act of 1898 furnishes a simple, plain answer. It requires these shares of stock to be returned for taxation which would seem to be a clear, unmistakable expression that they are to be taxed. There is no other conceivable reason for this requirement.

Also the Act of 1884–5, p. 28–30, furnishes an answer.

How is the legislative intent to levy a tax on any property expressed except by authorizing the proper officer to assess and levy a tax and requiring the return of the property. This has been done as to this stock. It is conceded that the question is not what the State can do, but what it has done. That if there has been a clear expression of legislative intent to treat shares in a corporation as distinct and separate property in the hands of the holders, these shares must be taxed. Such intent is clearly apparent under the Act of 1898. If not what is the intent? Is the State inquiring after a mere symbol—a vanishing shadow? The property of the corporation is in Alabama and beyond reach. If it is the rule or policy of Georgia to regard these shares as also located there what right has Georgia to inquire of the tax payer how many he has or their value. The requirement that these shares and their value, must be returned for taxation is either meaningless—senseless and unauthorized or it is a clear declaration that they are to be treated as distinct and separate property in the hands of the holders. The State cannot treat them at all—it has no concern as to them unless they are distinct and separate property no more than it has with any other personal property physically located in Alabama. But it does treat with them and the conclusion is irresistible that it intended they should be regarded as distinct and separate property.

Our inquiry is not what was the rule or policy in Georgia twenty years ago when the decision in 64 Ga. was rendered under another tax system, but what it is now under a new system and a new Constitution intended to subject property theretofore not taxed. If it be conceded that under that decision shares were to be regarded as only representing an interest in the property of the corporation and as in substance the same, it is admitted the State had the power to declare a different policy. It has clearly done so by the Act of 1898.

To now hold that these shares are so much interest in real property in Alabama would put the Legislature in the worse than ridiculous attitude of requiring a return of such an interest. Nor would its attitude be less ridiculous by changing the phraseology of the proposition and saying that these shares are a mere shadow of a substance that is located in another State. The Act of 1898 on the subject means something and it can mean nothing else than that whatever may have been the policy theretofore under that Act such shares should be treated as distinct and separate property in the hands of the holders. This being so it is conceded that they are to be taxed.

Besides in this very Act (1898, p. 29) the Legislature recognizes "stocks" *as property to be taxed*, in requiring that the "agents in this State of any person, firm or corporation resident without this State, who shall have on hand for sale, storage or otherwise, as such agent, any merchandise or other property including money, notes, accounts, bonds, STOCKS, &c., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property in this State is taxed."

Acts 1898, p. 29;

See also 94 Ga., at 202.

If 64 Ga., 799 under the old Constitution holds that stock in a corporation is only so much interest in the property of the corporation, see 109 Ga., 72, where the Court distinctly holds: That the tax on the shares of stock was a tax against the property of the shareholder and in no sense relieved the property of the corporation from taxation.

109 Ga., 71-72, citing 94 Ga., 202.

The Court further says: "There can, therefore, be nothing in the claim in this case that the shares of stock taxed represent the property of the corporation; nor from its nature, as above shown, can it be successfully contended that the tax provided for is anything but a direct tax on property."

109 Ga., 72.

COMMENTS ON 64 GA., 783 AT 799.

The dictum of Judge Jackson in 64 Ga., 799 (Wright, Comptroller, v. S. W. R. Co.) to the effect that shares in a railroad company simply represents the property which is real estate and is not taxable as property in the hands or the owner of the shares, was clearly not well considered at the time, and is now manifestly unsound in principle and at variance with established authority. (See authorities cited to this point in other portions of Petitioner's Brief.)

In extenuation of this deliverance in 64 Ga., the following is quoted from the decision itself at the conclusion, viz.:

"Indeed all the points decided (herein) may require revision when the case is fully tried and all the facts are brought out. The views given above are merely indications of what we now think, from our understanding of this record as it now appears."

64 Ga., at 801.

The above decision was rendered on the preliminary injunction and sent back for trial on its merits.

It should also be remembered that the case in question arose under the Constitution and laws existing before the Constitution of 1877 requiring all property to be taxed, except that which was therein specifically exempt.

It must also be remarked that by the express Statutes of Alabama where the W. A. Railroad is located, shares of stock in a railroad is declared to be personal property.

When the case in 64 Ga., was decided, the Legislature had the power to exempt from taxation any property, either by express enactment to that effect or by failing to provide the machinery for getting it on the digest.

109 Ga., 80 h. n. 1.

At that time railroad shares enjoyed this immunity, because there was no provision made for *listing and assessing* this property.

But by the Constitution of 1877 the power to "exempt" from taxation was taken away from the Legislature, and thereafter it could not do so if it desired, either expressly or by failing to provide the necessary machinery.

109 Ga., 80 h. n. 2.

But the Legislature has not since tried to do so by *either* method. On the contrary in the Tax Act of 1898, page 36, the Legislature expressly provides for placing railroad shares in foreign corporations on the Tax Digest. Also in the Act of 1884, 5 p. 28 and 30, shares in foreign corporations were expressly declared to be personal property for purposes of taxation.

The law defining what railroad property should be taxed (Section 780 of the Code) was already broad enough and needed no addition or revision to make it conform to the Constitution of 1877.

It was only necessary, therefore, for the Legislature to provide the necessary machinery for placing it upon the Tax Digest. This it did in the Act of 1884–5 and the Act of 1898, which included all "taxable" property and submitted a specific question with respect to railroad shares in foreign corporations. And by the Constitution *all* property is "taxable" except that which is exempt.

CHOSES IN ACTION TAXABLE IN GEORGIA AT THE DOMICILE OF THE OWNER.

In 50 Ga., at 392, our Supreme Court, overruling 33 Ga., at 113, say: "The property in bonds and notes or other obligations to pay money is located at the place of the residence of the owner of them, and that at least since the first of January, 1863, when the Code went into effect, such is the law of this State for purposes of taxation.

50 Ga., 392-3.

In the same case at page 393, the Supreme Court further says:

"But the current of authorities as to stocks, bonds and notes for money, very decidedly fixes their locality at the residence of the owner for taxation."

50 Ga., 393.

Here, the Court distinctly announces that in Georgia "stocks" as well as bonds, notes, etc., have their situs for taxation at the domicile of the owner.

50 Ga., 393;
Cited and approved in 104 Ga., 497;
Atlanta, etc., v. Stewart, 109 Ga., at 87; 90 Ga., 648.

"Bonds, notes or other obligations for money, on persons in other States, or of other States, or bonds of corporations of other States, and shipping are the subjects of return and taxation in this State."

Code Sec. 776;
50 Ga., 387, 392;
104 Ga., 497;
109 Ga., 87;
90 Ga., 648;
Acts of 1898, p. 36.

THE ACT OF 1884-5 AND THE CODE OF 1895.

But counsel for the railroads seek to get rid of the force of the Act of 1884-5, p. 28-30, declaring shares of stock in foreign corporation to be taxable by saying that this Act was not codified into the Code of Georgia of 1895.

This Act is substantially embraced in the Code of Georgia of 1895, and certainly nothing in the Code is in conflict with said Act.

See, Civil Code Vol. 2, Sec. 3070;
Civil Code Vol. 2, Sec. 2165;
Vol. 1 of Code, Sec. 833.

The substance of this Act being already embraced in the above named sections of the Code (Secs. 3070 and 2165) there was no occasion for its repetition.

But the omission from the Code of an Act in force before its adoption does not repeal said Act if not inconsistent with the provision of the Code.

See, 53 Ga., 675;
112 Ga., 40 (1);
42 Ga., at 195 and 196;
111 Ga., 760 at 768, 769 and 770.

Of course the adopting Act validates what is contained in the Code.

104 Ga., 831;
114 Ga., 533.

But it does not repeal pre-existing statutes which may not be incorporated in the Code.

Unless the contrary manifestly appears from the words employed the language of the Code should be understood as intending to state the existing law and not to change it.

107 Ga., 599.

But this Act of 1884-1885, pages 28 and 30, is cited mainly as a conclusive reply to Railroad Company's contention, as approvingly stated by Judge Newman, "that while the State has the power to treat shares as distinct and separate property in the hands of the holders * * * for purposes of taxation," the Legislature of Georgia has not expressly done so.

Surely, the "legislative intent" so earnestly searched for by Judge Newman is found expressly stated in the Act above quoted.

APPENDIX.

STATUTES CITED IN BRIEF NECESSARY TO THE DECISION OF THE CASE.

Constitution of Georgia, viz:
Code Sections 5883-5884 5886;
Code Sections 3070, 2165, 780;
Acts 1898, p. 35, 36, Sec. 16, Par. 30, 31, 32;
Acts 1898, p. 29;
Acts 1884–5, p. 28–30.

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may, however, impose a tax upon such domestic animals as, from their nature and habits, are destructive."

Constitution of Georgia, Code Sec. 5883.

"The General Assembly may, by law, exempt from taxation all public property, places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association, kept in a public hall, and not hold as merchandise or for purposes of sale or gain: Provided, the property so exempted be not used for purposes of private or corporate profit or income."

Constitution of Georgia, Code Sec. 5884.

"All laws exempting property from taxation, other than the property herein enumerated, shall be void."

Constitution of Georgia, Code Section 5886.

"Personalty, or personal estate, includes all such property as is movable in its nature; in fact, everything having value inherent in itself, or the representative of value, and not included in the definition of realty. Stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, are personalty."

Code Sec. 3070.

"The stock in said railroad company shall be deemed personal property and shall be transferable in the manner prescribed by the by-laws of the company, and no share shall be transferable until all previous calls thereon shall have been fully paid in. All property, whether real or personal, of any stockholder in this State shall be exempt from the debts or liabilities of said company, except to the amount of the unpaid subscription of said stockholder to the capital stock of said corporation. In no case shall said road be bonded or capital stock increased except by a vote of *two-thirds of the capital stock of said corporation* represented at an annual or a special meeting of stockholders called for that purpose, and after each stockholder has been notified in the manner prescribed for notifying stockholders, and in addition to said notice there shall be published in some newspaper in the town or city where the

principal office of said corporation is located, once a week for four weeks prior to the time of holding said meeting, a notice stating that at said meeting so called an increase of the stock or an in issuance of the bonds of the road would be considered, either or both. No action contemplated under this section looking to an increase of stock or issuance of bonds shall be legal unless there shall be present at said meeting a majority of stock, represented in person or by written proxy."

Code Sec. 2165.

"In addition to the questions now propounded to tax-payers by the tax-receivers, questions *shall* be framed by the Comptroller-General to reach *all property* upon which a tax is imposed by this Act, and especially the following questions * * * *

How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?

What was the gross nominal value thereof?

What was the fair market value thereof?

Acts of 1898, pages 35 and 36, Sec. 16, Par. 30, 31 and 32.

"And provided further, that the agent in this State, of any person, firm or corporation, resident without this State, who shall have on hand for sale, storage or otherwise, as such agent any merchandise or other property, including money, notes, accounts, bonds, *stocks*, etc., shall return the same for taxation to the Tax Receiver of the County where the same may be, to be taxed for State and County purposes as other property in this State is taxed."

Acts of 1898, p. 29.

"The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Competroller-General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State.

Code Sec. 780.

1. Section 2 of the Act of 1884-5, entitled.

"An Act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes.

"Section 2. Be it further enacted, That personal property shall be construed, for purposes of taxation, to include all goods, chattels, monies, credits and effects, whatsoever they may be, all ships, boats and vessels belonging to the inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due the person to be taxed; *all stocks and securities*, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt by the laws of the United States or of this State."

See Georgia Laws of 1884-5, pages 28 and 30.

Respectfully submitted,

BOYKIN WRIGHT,
JOHN C. HART,
Solicitors for Petitioners.

Office Supreme Court U. S.
FILED
OCT 14 1894
JAMES H. McKENNEY,
Clerk.

90.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM A. WRIGHT,
Comptroller General,

vs.

LOUISVILLE & NASHVILLE R. R. CO., ET. AL.

N[redacted]

SUPPLEMENTAL BRIEF

of

BOYKIN WRIGHT and JOHN C. HART, FOR PETITIONER.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM A. WRIGHT, Comptroller General,

vs.

LOUISVILLE & NASHVILLE R. R. CO., ET. AL.

No. 234. October Term, 1903.

SUPPLEMENTAL BRIEF

of

BOYKIN WRIGHT and JOHN C. HART, FOR PETITIONER.

I.

For a statement of the case and a full brief of the argument for the State of Georgia, reference is made to the Printed Brief submitted to this Court on the Application for the Writ of Certiorari in this cause, copies of which have been filed herein as the brief and argument for the State in this hearing.

II.

Two questions are presented by the Record:

(1). Did the complainants have such interest in the matter complained of as to entitle them to maintain said Bill, and such equity as to entitle them to relief by injunction?

(2). Are the shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Rail-

road & Banking Company, a Georgia corporation, taxable as property of the latter, by the State of Georgia?

The first question is treated of fully in the Printed Brief referred to, pages 6 to 11, inclusive, and requires no further elaboration herein.

The second question has also been fully discussed in the Printed Brief, pages 11 to 27, inclusive. But the following supplemental observations on this branch of the case are respectfully submitted.

III.

TAXATION OF SHARES OF STOCK IN A FOREIGN CORPORATION IN THE STATE OF THE OWNER'S RESIDENCE.

This Court has in a very recent case (Kidd vs. Ala., 188 U. S., 730) carefully considered this question and ruled substantially the following points:

(1). Mrs. Kidd, a resident of Alabama, must there pay taxes on her stock in a railroad company located in a foreign State;

(2). The "equal protection" clause of the U. S. Constitution was not violated in taxing such stock while exempting stock in domestic railroads, whose *property and franchises* were taxed in Alabama;

(3) This decision assumed that the Code of Alabama, as interpreted by the Supreme Court of Alabama, *did tax* these shares of *foreign* railroads and *did exempt* shares in domestic railroads;

(4). The Supreme Court of Alabama in this case (28 So. R., 480) ruled that there was no specific act in so many words taxing shares in foreign railroads, the law merely "declaring subject to taxation 'all other property real and personal not otherwise specified'" (28 So. R., 481), and holding that shares in stock of corporations are "personal property," 28 So. R., 481. and on *general principles that* its situs for taxation is at the owner's domicile.

28 So. R., 481.

(5). That if the corporate property is untaxed by its laws (those of Alabama) then for the purposes of its laws the property is not taxed at all. If the property is taxed elsewhere, with this the State of Alabama is not concerned;

(6). The *right* to tax stock in foreign corporations is assumed.

IV.

THE SITUS OF SHARES OF STOCK.

Counsel for the Railroad Companies cite two rather recent cases in support of their contention that the situs of shares of stock is at the *domicile of the corporation*, and not at the residence of the stockholder, viz., People's National Bank, etc., vs. Cleveland, 117 Ga., 908, and The Jellenik vs. Huron Copper Mining Company case, 177 U. S., 1.

Neither of the above cases related to the situs of shares for purposes of taxation.

In People's National Bank, etc., vs. Cleveland, above cited, the Supreme Court of Georgia merely decide that shares of stock in the Georgia Railroad & Banking Company, held in Tennessee by an owner there, is personal property located in Richmond county, Georgia, (the locus of the corporation) *for the purpose of that suit*. The plaintiffs in that suit claimed that they were the real owners of the stock in the Georgia Railroad & Banking Company, the script having been fraudulently acquired by the Tennessee holder, and brought their equitable petition in Richmond county Georgia, against the Georgia Railroad & Banking Company, and the Tennessee holder of the shares and prayed for a decree cancelling the fraudulent script, and for the payment of the dividends to plaintiffs.

Manifestly "*for these purposes*" the situs of this suit was in Georgia, at the domicile of the corporation. The Court held:

(2). "The shares of stock were personal property and for the purposes of *this suit their situs* was the domicile of the domestic corporation."

117 Ga., 908.

Well, what was the "purpose of that suit?"

It was to compel the corporation to recognize the plaintiffs as the true owners of the stock, and not the persons to whom it had issued the shares, through the fraud of those parties, and to cancel the old stock and issue new stock to plaintiffs. That could only be done here in Richmond county where the corporation was domiciled; and under a special statute of Georgia providing for service by publication in such cases the holder of the shares in Tennessee could be served and bound. There is nothing in that decision in conflict with the general doctrine that shares of stock are personal property and for purposes of taxation their situs is at the domicile of the owner.

The Jellenik case in 177 U. S., 1, cited, likewise is not in conflict with this doctrine. In this case precisely that was done which was done in the Georgia case (117 Ga., 908), viz., the jurisdiction of the Court was sustained on the idea that under the Michigan statute the shares were personal property located at the domicile of the corporation "for the purposes of that suit" within the meaning of the Act of Congress of 1875, giving United States Courts jurisdiction over non-resident defendants in cases where they are interested in property within the District, which was to compel the corporation to "cancel the certificates held by persons outside of the State and regard the plaintiffs as the real owners of the property interest represented by them (shares)," and to remove cloud from title.

177 U. S., at 14.

In this case the Supreme Court of U. S. says (p. 13):

"Whether stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it (the stock) is within Michigan *for the purposes of a suit brought there against the Company*—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them."

177 U. S., 13.

No doubt was expressed that these shares held in Massa-

chusetts were *taxable there* in the hands of the resident owners. And that is the only point involved in the case at bar.

Again, in the Jellenik case, above, suit was brought in the United States Court for the Western District of Michigan by plaintiffs against the Huron Copper Mining Company, a corporation, and others, of Michigan, and citizens of other States than Michigan; among them Watson, Demmon and Stevens, being residents of Boston, Mass.

Process was served upon the Huron Mining Company and other defendants residing in Michigan: Watson, Demmon and Smith being non-residents, were proceeded against by publication, but they failed to appear. The company appeared and pleaded to the jurisdiction of the Court, because:

(1). That Watson, Demmon and Smith were indispensable parties to the suit but not inhabitants of the District, and there was no service in the District, nor had they voluntarily appeared and submitted themselves to the jurisdictioon of the Court;

(2). That the stock of the Huron Company belonging to the complainants was not personal property "within the District."

The plea was sustained and the case appealed to the Supreme Court. Of course Watson, Demmon and Smith being indispensable parties and *non-residents* the Court had no jurisdiction of their persons (they not being actually served in the District. Service in this suit was made*by publication,* based on the Act of Congress of 1875, which declares:

"When in any suit commenced in any Circuit Court of the United States, to enforce any legal or equitbale lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property *within the District* where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within said district, or shall not voluntarily appear thereto" service may be made on such absent defendants by publication. Provisions is made in said Act also for service upon the person in possession of said property within the District.

177 U. S., p. 9.

"The question to be determined on this appeal is whether the stock in question is personal property *"within the District"* in

which the suit is brought. If it is, then the case is embraced by the Act of 1875, and the Circuit Court erred in dismissing the bill."

Ib., p. 10.

It is respectfully submitted that in both of the above cases the situs of the shares was held to be at the domicile of the corporation for the *purpose of those suits* only, where the main relief sought was against the corporation itself to compel it to regard the complainants as the real owners of the property, etc., and that they are not authority for the position of respondent in the case at bar.

V.

THE POWER OF THE COURTS TO EXEMPT FROM *TAXATION BY JUDICIAL CONSTRUCTION.*

It is claimed that while the Court can not under the Constitution of 1877 directly "exempt" from taxation, any property, it can define what *is* property, and by defining "shares of stock" in a foreign corporation *not to be property,* under certain circumstances, thus indirectly exempt it.

The most that can be claimed for the decision relied on to support this doctrine, viz., 64 Ga., 799, is that in the State of the law as it existed when the tax assessment was made in that case in 1876, "shares of stock" here, in a foreign railroad corporation was not subject to be taxed against the holder here. Why did the Court so hold at that time? At that time such stock was not required to be returned by law, and was thereby not taxed under the Constitution of 1868. Under the Constitution of 1868 the Legislature could exempt any property from taxation, and could do this either *expressly,* or simply by not requiring it to be returned or placed upon the digest.

109 Ga., (h. n. 1.)

Now, under the Constitution of 1877 and the Acts of the Legislature of 1884-5 and 1898, such stock is required to be returned and can not be exempt.

109 Ga., 80 (h. n. 2.)

As stated, the only thing decided in 64 Ga., 799, was that as the law then stood shares of stock here in a foreign railroad

corporation was not subject to be taxed against the holder here. It is true that Justice Jackson in a sentence immediately following indulged in an abstraction which for some purposes is true, and for others is untrue, viz:

"Stock in a railroad is really but so many shares of its property and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

But this deliverance is no part of the decision itself, which simply declared that stock in a foreign railroad held here was not at that time taxable here. He did not remotely intimate that if the Legislature had then seen proper to tax such shares as property here it would not have had the right to do so.

Clearly, under all the authorities the State had then, as it has now, the *power* to tax such shares as actual property in the hands of a resident holder. The decision went, therefore, no further, at most, than to hold that as the law existed in 1876, the State had not then seen fit to lay a tax upon shares of stock held here in a railroad without the State, whose property was taxed at its domicile.

It will be observed that prior to 1877 the *Legislature* in this State was vested with the power to deal with the subjects of taxation and to exempt such property as it saw fit; but by the Constitution of 1877 this power was taken away; that is to say, the *Constitution* itself undertook to declare what property should be taxed, and what might be exempt, and forbade the Legislature from exempting any property not specifically enumerated in and authorized to be exempted by the Constitution of 1877. All other property not thus authorized to be exempt was by the *Constitution itself* taxed.

Article 7 Sec. 2 Consti. of 1877;
Code of Georgia Sec. 5883-4;
Code of Georgia, Sec. 5886;
Verdery vs. Village, 82 Ga., 138, at 140; 84 Ga., 683; 109 Ga., 80 (h. n. 1, 2, 6 and 8, and at 98).

These mandates of the Constiution of 1877 have since been reinforced by definite declarations of the Legislature.

In 1885 an Act of the General Assembly of Georgia was passed entitled "An Act to provide for the correct returns of the

property in this State for the purpose of taxation, and for other purposes." In section 2 of said Act it was provided, as follows: "Personal property shall be construed, for purposes of taxation, to include all goods chattels, etc.,; all *stocks* and securities, whether in corporations within this State or other States owned by citizens of this State, *unless exempt* by the laws of the United States or of *this State.*"

Acts of 1884-5, page30.

By the Act of 1898, pages 34, 5 and 6, it was provided, as follows:

"In returning property for taxes all property shall be returned at its value. In addition to the questions now propounded to tax-payers by the Tax Receivers, questions shall be framed by the Comptroller General to reach *all* property upon which a tax is imposed by this Act, and especially the following questions:

* * * 30. How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?

31. What was the gross nominal value thereof?

32. What was the fair market value thereof?

33. How many shares of stock did you own, on the day fixed for the return of property for taxation, issued by corporations within this State the capital stock of which is not returned by such corporation for taxation?"

Thus the present policy of the State in dealing with domestic shares and foreign shares for the purpose of taxation is here made clearly manifest. These legislative enactments clearly interpret the constitutional provision requiring all property to be taxed as not requiring shares of stock in domestic corporations whose corporate property is fully taxed by the State to be also taxed, because such domestic shares indirectly bear their just proportion of the public burden in the taxes collected from the corporate property, whereas the constitutional provision in question could not be so interpreted with respect to shares in foreign corporations whose corporate property is not taxed here.

If it be claimed that the Acts of 1884-5 made no such distinction between domestic and foreign shares, but required that

both should be returned unless specially exempt by the laws of the United States, or of the State of Georgia, it is enough to say in reply (1) that the Act of 1898 did make such distinction, and that it was competent for the Legislature by way of avoiding double taxation to so interpret the Constitution, there being nothing in the Constitutional provision itself making it mandatory upon the Legislature to substantially tax the same property twice in this State; and (2) where property has in effect *once* been taxed as in case of domestic shares, it *is* exempt from being taxed a second time by the same taxing power.

By the foregoing provisions of the Constitution of 1877, and of these acts of the Legislature passed since the decision of 64 Ga., 799, the policy of the State to tax shares of stock in a foreign corporation is clear and unmistakable and the Legislature can no longer, since the Constitution of 1877 "either expressly exempt from taxation or accomplish this result by a failure to tax any property except that which in the Constitution itself the General Assembly is expressly authorixed to exempt."

109 Ga., 80 h. n. 1 and 2);
109 Ga., 80 (h. n. 6).

Conceding therefore that it might be now competent, under the Constitution of 1877, for the Legislature and even for the Court by judicial interpretation to apply the doctrine insisted upon by the railroad companies with respect to domestic shares of stock, where the corporate property itself, which alone gives value to the shares, has been once taxed by the State and that therefore to tax the shares also would be in effect to tax the same property *twice*, there can be no such reason for applying the doctrine to shares of stock in a foreign corporation whose corporate property is not and can not be taxed at all by this State. The Constitution of 1877 requiring that all property shall be taxed, might not be violated by failing to tax domestic shares where the corporate property giving value to those shares has been fully taxed, while it could not be so satisfied in case of foreign shares held here whose corporate property is beyond the State. If these foreign shares themselves be not taxed, they pay nothing, directly or

indirectly to the support of the Government which pretects them.

But we deny that it is competent for any court of its own motion to declare that not to be property which is property, and thus in effect nullify a provision of the present Constitution taxing all property not expressely exempt thereby.

A parallel case to this is where even the Legislature was not permitted to define an "Armory" used by the State militia to be "public property" within the meaning of the Constitution and therefore exempt from taxation.

113 Ga., 883.

In that case the Supreme Court of Georgia says:

"Private property can not be converted into *public* property by the simple declaration of the General Assembly; and especially is this true when the purpose of the declaration is to relieve private property from a burden which the Constitution says in unmistakable terms shall be borne by it for the benefit of the public."

113 Ga., at 886.

A contrary doctrine would clothe the Courts with the power to give exemptions by holding certain species of property not to be property—a power not allowed even to the Legislature.

113 Ga., 885.

See 109 Ga., 80, at p. 98, where the Court submitted a quaere as to the power of the Legislature to provide against taxing shares even when the corporate property itself had been fully taxed by this State, and the object of so declaring might be to avoid double taxation by the same State of the same property; but even this quaere is not pertinent where the corporate property is in a foreign State, and only the shares are taxed here. In such a case there could be no such reason for not taxing the foreign shares since the corporate property is not and can not be taxed by this State.

In 113 Ga., at 885, the Court says:

"Any one claiming an exempion from taxation must show *an*

act of the General Assembly (not the decision of a Court rendered before the Constitution) passed in *pursuance of the Constitution,* authorizing the exemption." 113 Ga., at 885.

Such an Act may be claimed in behalf of *domestic* shares in the Act of 1898 (see question 33) but this very Act specifically requires the taxpayer to return for taxation the foreign shares.

It is idle to say that the railroad companies in this case are not claiming an *exemption*—not, it is true, an exemption conferred by the Constitution or by the Act of the Legislature, but nevertheless an exemption claimed under a judicial construction (antedating the existing Constitution and laws) that shares in a foreign corporation *are not property for* purposes of taxation, but mere *representations* thereof.

VI.

NO "EXEMPTION" NOT TO TAX SHARES WHERE CORPORATE PROPERTY TAXED.

It is contended by counsel for the Railroad Companies that "where Constitutions prohibit exemptions and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed are valid."

Why? Because being located in the State the property of the corporation is taxed once by the State, which satisfies the demands of the Constitution, whereas in case the property of the corporation is located outside the State, the property of the corporation is not and cannot be taxed; and the only thing left to be taxed are the shares. In the language of the Supreme Court of the United States in the Kidd vs. Alabama case (188 U. S., 730):

"If property (of the corporation) is untaxed by its laws, then for the purposes of its laws, the property is not taxed at all."

Kidd vs. Ala., 188 U. S., 730.

The cases cited by counsel for the Railroad Companies in support of the above proposition are:

Lewiston vs. Asotin, 64 Pac., 544 (Wash);
Carroll vs. Alsup, 64 S. W., 193 (Tenn).
Foster vs. Stevens, 13 L. R. A., 166-9 (Vt);
Bank vs. Nashua, 46 N. H., 389;
Sherman vs. Kimball, 54 N. H., 406.

The authorities cited sustain the principle only so far as it applies to domestic corporations except where there is a specific act of the legislature making it applicable to shares in a foreign corporation.

In so far as the above decisions relate to not requiring domestic shares to be taxed whose corporate property is fully taxed, they do not apply to the case at bar. They proceed upon the idea that these domestic shares have already been, in effect, once taxed by taxing the property which give the shares their sole value.

In Foster vs. Stevens (the Vermont case) the Revised Laws of that State, Section 270 specifically provides that shares in foreign corporation, where the corporate property is taxed, shall not be taxable in Vermont. It does not appear that the Vermont Constitution touches upon the subject of exemption or non-exemption from taxes.

See 13 L. R. A., 166.

Hyland vs. Central Iron, etc. Co., 13 L. A. R., 515 (Ind) also cited by counsel for the Railroad Companies, does not appear to be in point. There is a specific Act of Indiana providing that shares should not be taxed where corporate property is taxed. The decision simply says this does not apply to taxation of excess of value of capital stock over the tangible property.

13 L. R. A., 515.

It will be remembered that this very Court (Supreme Court

of Indiana) has distinctly held that the act above mentioned to the effect that shares should not be taxed where corporate property is taxed, did not apply to shares of stock in a foreign corporation, and that these should be taxed under the general law requiring all property to be taxed although domestic shares were specifically exempt in cases where the property of the corporation was taxed in Indiana.

Seward vs. Rising Sun, 13 Am. & Eng. R. Cas. 316, or 79 Ind. 353.

The case of Lewiston vs. Asotin (Wash), 64 Pac., 544, cited by counsel for the Railroad Companies, decided that after taxing all the property of a domestic corporation it would be double taxation to also tax the "capital stock" of the Company.

64. Pac. R., 544.

No hint is given that such would be the case as to shares in a foreign corporation whose property was not and could not be taxed by the State of Washington.

VII.

IT IS CLAIMED THAT THE ASKING OF A QUESTION IS NOT LEVYING A TAX.

Counsel for the Railroads contend that the question of the Act of 1898 calling for a return of foreign shares for taxation can be given effect and should be construed merely as calling for the information as to foreign shares that the Tax Receiver may ascertain whether there be any which come within the class of those corporations which do not pay taxes on the property representing the value of such shares and as intended to elicit as to foreign shares, the information sought by section 33 as to domestic shares.

See response to the Writ, pp. 6, 7.

In addition to what has been said on this branch of the case, in the main brief on pages 23, 24 and 25, we submit this reply to the above:

This is subtle and ingenious but it is without force since this inquiry could elicit no such information, as such question does not call for the name of the stock or its location, or whether the corporate property is taxed in the State where located.

VIII.

"UNIFORMITY" AND "EQUAL PROTECTION."

It is contended by counsel for the Railroad Companies that to tax foreign shares and not to tax domestic shares violates the "uniformity" clause of the Georgia Constitution and the "equal protection" clause of the United States Constitution.

Kidd vs. Alabama, 188 U. S., 730, answers the latter contention in totidem verbis.

Does it not also in effect answer the first?

Again applying the principle so often herein repeated, where the State of Georgia has custody of the corporate property and taxes it once it may well allow that in that case the State Constitution has been satisfied without taxing its shares also; whereas if the corporate property by reason of being outside of the State escapes all domestic taxation, the State may consider it no lack of uniformity and no inequality to exact at least of the foreign shares, located here as personal property in the hands of a resident owner, their right ful contribution to the support of the Government which protects them and their owner.

Kidd vs. Ala., 188 U. S., 730

See our Main Brief, pages 13, 14 and 15.

The uniformity required by the Constitution of 1877 is that the tax "shall be uniform upon the same class of subjects," (5883 of the Code). Here there would be absolute uniformity. The domestic shares would pay its tax indirectly by the corporation paying taxes on the corporate property. The foreign shares would pay the same amount of taxes but pay them directly upon the shares which alone are located in this State.

Hence the uniformity clause would seem to *require*, rather than *excuse*, their taxation.

IX

As before stated counsel for the Railroad Companies have cited authority to the point that "where Constitutions prohibit exemptions and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed, are valid."

It is submitted that these decisions are also to the point that there is no violation of the uniformity clause of the Georgia Constitution in this tax Act not requiring a tax upon domestic shares of stock, and at the same time requiring a tax upon foreign shares held here, whose corporate property is not here taxed, and, therefore, not taxed at all so far as the State of Georgia is concerned.

In other words, while a State under such provisions of the Constitution might have the *power* to tax both the corporate property and the shares of its domestic corporations, there is nothing in these provisions of the Constitution requiring the State to do so, where it would operate, in effect, to double tax the same property by the same taxing power.

X.

But if it be true that the legislature under the Constitution of 1877 is without power to relieve or except domestic shares from this tax but must require them as well as foreign shares to be returned, the effect would be not to invalidate the tax on foreign shares, but only to render ineffective the attempt to except domestic shares. The effect would be to make the domestic shares subject and not to make void the tax upon foreign shares.

109 Ga., at 92 and 93.

The Supreme Court of Georgia, in above case, says:

"The Act of 1896 (identical with Tax Act of 1898 on the point ruled) does provide for the assessment and levy of a uni-

form ad valorem tax on all the taxable property in the State This does furnish authority sufficient to cover all taxable property, etc. * * * If, then, there is an act broad enough to cover all property and there is an attempt to except *some* from it, the Act will stand, but the exception will fall."

Atlanta National Association vs. Stewart, 109 Ga., at 92 and 93.

In no case will any Court declare an act of the Legislature void because in conflict with the Constitution, unless obliged to do so.

Least of all will a Federal Court undertake to declare an act of the State Legislature to raise State revenue, void, on account of its being violative of some provision of the State Constitution. It is the peculiar business of the State Courts to do this.

Calder vs. Bull, 3 Dallas, at pages 392-393.

If this Court should reach the conclusion that there is a lack of uniformity or equality in taxing foreign shares while exempting domestic shares, it would follow the decision of the Supreme Court of Georgia, above cited, (109 Ga., 92, s.) and hold that where the act is "broad enough to cover all property and there is an attempt to except *some* from it, the act will stand, but the exception will fall."

Atlanta National Association vs. Stewart, 109 Ga., 92 and 93.

IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1902.

No. ——

WILLIAM A. WRIGHT, APPELLANT,
PETITIONER FOR CERTIORARI,
versus
LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, APPELLEES,
RESPONDENTS.

Petition for issuance of the Writ of Certiorari.

Response of Appellees, Respondents, to the application of Appellant, Petitioner, for the writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the above-stated case.

In response to the petition for the issuance of the *writ of certiorari* in the above-stated case, and for cause why the said petition should not be granted, the above-named Appellees, Respondents, say:

1st. That said case was, as shown by the petition for the *writ of certiorari*, argued in May, 1902, and was decided by the Circuit Court of Appeals on October 13, 1902. That no application was made for any rehearing in said cause, in or to said Circuit Court of Appeals, nor is any reason shown why such application was not so made.

2d. That the petition for certiorari shows that it is claimed in said case that the stock in question has been subject to taxation ever since it was issued in the year 1882. It is claimed that by the Constitution of Georgia, adopted in 1877, all such stock was rendered taxable, and any exemption forbidden. It

is also shown that since 1882 this stock has been in the same possession and category in which it now is. That at no time since 1877 or 1882 until May, 1901, was any demand ever made by the Comptroller-General, or any one else, for the payment of taxes upon said shares of stock.

3d. That the petition for certiorari and the record show that the claim of the appellees in this case does not involve the power of the State of Georgia by appropriate legislation to tax shares of stock, but merely whether under her existing Constitution and laws she does tax shares of stock which represent fixed properties, or whether she regards them as mere representatives of such properties and as not being separate taxable property. That at the time of the adoption of the Constitution of Georgia in 1877, the status of stock corporations owning railroads, and of stocks of foreign railroad corporations, had been settled by the decisions of the Supreme Court of Georgia.

In the case of *Wright, Comptroller-General, vs. Southwestern Railroad Company*, it was insisted that the Railroad Company should return and pay taxes on certain railroad stocks owned by it. The record of file in the Supreme Court of Georgia shows that such taxes were demanded upon certain *shares* of its own stock, and also upon shares in other railroad companies, including some stock in a railroad company of Alabama. The Court held the stock not taxable, saying:

> "(*a*) Stock in the company's own road, held by itself, "or in other roads in this State, whose charters limit or "exempt taxation thereon, and whose income is taxed, "is not liable; and stock held by the company in rail- "roads without the limits of this State is not taxable here. "Stock in a railroad is really but so many shares of its "property, and that property is real estate, for the most "part, at least, and taxable by the State in which the "road is located."
>
> "(*b*) But bonds, notes and all other mere evidences "of the debt follow the *situs* of the creditor, no matter "where the debtor lives."
>
> *Wright, Comptroller-General, vs. Railroad Co.*, 64 *Ga.* 783, 799.

This decision was rendered by three Judges (the full bench) and has never been reversed by the Supreme Court.

The law, in force in Georgia since the year 1858, declares as to a decision by a full bench:

> "A decision concurred in by three Judges can not be "reversed or materially changed, except by a full bench, "and then after argument had, in which the decision, by "permission of the Court, is expressly questioned and "reviewed; and after such argument, the Court in its "decision shall state distinctly whether it affirms, re- "verses or changes such decision."
>
> *Civil Code of* 1895, *Sec.* 5588. *Code of* 1882, *Sec.* 217.

This decision does not rest upon any *exemption* granted by the State, but rules that the stock is not taxable property, but only a representation. It declares the status of stock for taxable purposes.

4th. The later decisions in Georgia are in accord with this.

There has been no other decision on this point, but in a case where the Legislature by statute had directed that Building and Loan Associations should pay a tax on the market value of the shares of their members on which no loans had been made, in lieu of all other taxes (except a license tax). The court in holding this unconstitutional, as in effect exempting a part of the assets of the corporation from taxation, say concerning the right of the Legislature to refuse to tax both the property of the corporation and the shares of the stockholders, as involving double taxation:

> "There are, in general, four methods of taxing corpo- "rate interests. These are: 1st, by a tax on the fran- "chise; 2d, on the capital stock; 3d, on the real estate "and personal property of the corporation; 4th, by a "tax on the shares of stock in the hands of the stock- "holders. *I. Cook on Stock etc.* (*3d ed.*), *Sec.* 561. See "also, *II. Redf. Rwy.*, 453, and authorities cited. It is "not incumbent on the taxing power to impose a tax on "each, but it may do so; and while, as a rule, double tax- "ation is properly not favored, whether it will be im- "posed or not rests with the taxing power—originally

"the Legislature. The decision in *Mayor of Macon vs. "Macon Construction Co.*, 94 *Ga.* 201, is not in conflict "with the doctrine here announced."

Georgia B. & L. Asso. vs. Savannah, 109 *Ga.* 63, 70-1.

Also, in another like case the Supreme Court of Georgia quotes with approval the language of a Superior Court Judge, as follows:

"Possibly it may be competent to provide against tax- "ing the shares of stock where all the property which "gives them value has been taxed. I do not decide as "to this, because it is not before me directly. But in this "case, the act provides in terms, not for relieving share- "holders against what might be claimed to be double tax- "ation, if the company had paid on everything conferring "value on the share; but, on the contrary, it provides for "the company to pay only on the market value, not of "its property, but of shares belonging to certain of its "stockholders on which no loans have been made."

Atlanta National Assn. vs. Stewart, 109 *Ga.* 80, 98.

5th. It was conceded by counsel for Appellant that shares of domestic railroad companies are not taxed, and that they ought not to be taxed. (Transcript, pp. 14, 22).

The opinion of the Court below says:

"It is conceded by counsel for the Comptroller-General "that the State has not attempted to tax shares in do- "mestic corporations, and that it would be wrong to do "so."

Transcript of Record, p. 19.

This can only be because railroad shares are not, for taxing purposes, property, but mere *evidences of title* to the property in the hands of the *corporation*, and that the property *alone* is the taxable thing.

To hold otherwise would be to convict the government of the State of having violated its Constitution for over twenty-four years in not collecting taxes on railroad shares.

It would convict the Legislature of violating the Constitution in providing against the taxation of shares in domestic corpora-

tions with fixed assets,—which companies return all of their property for taxation. Yet it is conceded that such shares are not taxed.

If shares are property, and can not be regarded as mere symbols of interest in the corporate property, and as such not bound to be separately taxed, then domestic shares *must* be taxed.

> "Property of all kinds is by a proper interpretation "of our statute (Constitution) placed in one class as a "subject of taxation—and not only so, but taxation shall "be uniform on all property subject to be taxed."
>
> *Georgia B. & L. Asso. vs. Savannah,* 109 *Ga.* 63, 67.

This very decision later recognizes that shares of stock can be treated, not as exempt, but where the corporate assets are fully taxed, as mere certificates of an interest therein, and non-taxable.

Ibid, pp. 70-71.

If shares representing an interest in corporate property in Georgia are mere certificates of such interest, and non-taxable *as not being property for taxing purposes,* how can like shares representing like interests in property not in Georgia, but in Alabama, be regarded as property and be taxed without violating the provisions of Georgia's Constitution as to uniformity?

Surely it would take very express legislation to declare that a railroad share held by a Georgian in a Georgia Railroad Company *is not property* in Georgia, because a mere representative of fixed property—but a railroad share in an Alabama Railroad Company, although a mere representative of an interest in an Alabama corporation and in a railroad in Alabama, is property in Georgia.

Especially it should take the clearest mandate of the law to override the declaration of Georgia's own Supreme Court.

> "Stock held by the Company in railroads without the "limits of this State is not taxable here. Stock in a rail- "road is really but so many shares of its property, and "that property is real estate for the most part at least, and "taxable by the State in which the road is located."
>
> *Wright, Comptroller-General, vs. Southwestern R. R. Co.,* 64 *Ga.* 783.

6th. In response to the statutes claimed by Appellant to show a purpose to tax shares of foreign railroad stock, we say:

(a) As to the questions in the Act of 1898 cited. An inquiry is not the levy of a tax. It seeks for information,—it does not say the property is taxed, or seek to overturn the decision in

Wright, Comptroller-General, vs. Southwestern R. R. Co., 64 *Ga.* 783.

All presumptions are against such taxation.

See Judge Newman's opinion, Transcript of Record, p. 18.

Desty on Taxation, p. 199 *(Sec.* 39*).*

Cooley on Taxation, p. 165.

Cook on Stock, etc. (3d ed.), Secs. 561, 567.

Endlich on Interp. of Stat., Sec. 345.

Cook is cited by the Supreme Court of Georgia on this subject.

Ga. B. & L. Asso. vs. Savannah, 109 *Ga.* 63, 71.

(b) If the question 30 is to be taken as an absolute legislative declaration that shares of foreign railroad stocks must be taxed, then question 33 must be taken as a like declaration that domestic railroad shares are not to be taxed.

If railroad shares are property, then this is an unconstitutional exemption of domestic railroad shares.

If domestic railroad shares are not property, but mere evidence of title to an interest in the corporate property in the hands of the corporation,—then foreign railroad shares are the same, and equally *non-taxable.*

Construed in the first way, the Legislature has passed an unconstitutional Act exempting property.

109 *Ga.* 63, 67.

109 *Ga.* 80, 97.

Such a construction can not be had if any other can be found.

Park vs. Candler, 113 *Ga.* 647.

If the first question (30) be considered as calling for the information as to foreign shares that the Tax-Receiver may ascertain whether there be any which come within the class of those corporations which do not pay taxes on the property representing the value of such shares, and as intended to elicit, as to foreign shares, the information sought by Section 53 as to domestic shares, then the questions do not involve any conflict with the Constitution, and equally recognize that under the laws of Georgia shares representing interests in fixed corporate property which is taxed where located, are not separate taxable property in Georgia as declared in

64 *Ga.* 783.

The citation of Section 16, Par. 30-1-2 of the Act of 1898, as to what the agent of a non-resident should return for taxation, because it enumerates *stocks inter alia* as property to be returned for taxation, does not help the contention of Appellant.

This means *such stocks* as a resident would have to pay on. It does not intend to tax *all* stocks. Stocks representing interests in fixed properties were not being aimed at. If so, why are not domestic railroads and factory stocks taxed? It is admitted that they are not, and should not be, because *not taxable property.*

Appellant has also cited the second section of the Act passed by the Georgia Legislature at the session of 1884-5, which he claims indicates the intention of the Legislature to make stock of railroad companies incorporated without the State of Georgia, but held by citizens within the State, liable to taxation, when shares in like corporations created by the State of Georgia are recognized as non-taxable.

We submit that the act not only does nothing of the sort, but that it furnishes evidence:

First. Of a purpose to put all shares of stock, whether in corporations created by Georgia or by other States, upon the same footing.

Second. That it shows no intention to enlarge the class of shares of stock which were formerly subject to taxation under the previous decisions of the Supreme Court of Georgia; and,

Third. That its true significance is only to require the return for taxation *on a parity*, of such shares of capital stock in do-

mestic or foreign corporations as are not the representations of property elsewhere and otherwise taxed.

First. This section of the Act provides that

> "personal property shall be construed for the purposes of
> "taxation to include all goods * * * all stocks and
> "securities, whether in corporations within this State or
> "in other States, owned by citizens of this State, etc."

Distinguished counsel for Appellant says that is declaratory of the general policy of the State, and of the legislative intent that all personal property shall be construed to include for purposes of taxation all "*stock in foreign corporations*" owned by citizens of this State.

We insist that it is *expressly declaratory that all stocks and securities of corporations in this State, or in any other States, stand upon exact equality of treatment*, to wit: that such as, according to the decisions of the Supreme Court of Georgia theretofore made, represent fixed property, such as railroads, which properties were taxed where located, were not within the eye of the law property for taxation.

> *Wright, Comptroller-General, vs. Southwestern R. R.*,
> 64 Ga. 792, 799.

Had the purpose been otherwise the Act would have read that "personal property shall be construed," etc., to include, etc., "all stocks and securities in corporations in other States owned by citizens of this State,"—but is expressly declined to thus discriminate.

Second. The Act in question furnishes evidence that it did not propose to include all stocks, and to change the ruling made in 64 Ga., above quoted, but merely to reach such stocks as do not fall within the class described in such decision.

The same Act in section 1st thereof, in specifying the property to be enumerated to the Tax-Receiver, says:

> "The amount of capital invested in stocks of companies
> "other than such companies as are required to be returned
> "by the president or other agents, either to the Tax-
> "Receiver or the Comptroller-General."
>
> *Acts of* 1884-5, *pp.* 29, 29.

Third. We insist that the true significance of this Act was

simply to reach stocks not falling within the class described in 61 Ga. This is shown by applying the familiar rule of construing Sections 1 and 2 of the Act, so as to harmony and not in conflict.

It is further made manifest by the fact that the law also immediately succeeding this, to wit: those passed in the years 1888, 1890, *et seq.*, containing the following enumeration as to stocks which should be assessed, to wit:

> "stocks of non-resident companies or corporations, or of
> "companies or corporations in this State, whose capital
> "stock is not assessed by the president of such company
> "or corporation."
>
> *Georgia Acts of* 1888, pp. 55, 56.
> *Georgia Acts of* 1890, p. 65.

The words "capital stock," in this connection have been defined by the Supreme Court to mean the property of the corporation which represents the capital stock.

> 84 Ga. 572; 89 Ga. 695.

Unless this Act signifies what we have insisted, it would prove too much for the appellant. It would prove that all stocks, whether in corporations within or without the State, are taxable. Unless the Legislature can recognize that stock in the corporation is not separate property, but a mere evidence of title to the property held by the corporation, and already taxed in its hands, it can not exempt. If it does recognize that fact, then railroad shares of a corporation whose property exists in Alabama are not the representative of property in Georgia, and Georgia having declared that railroad shares are representative merely, is in no position, while asserting the non-taxability of shares in her own railroads, to insist upon taxing the same representative of property located beyond her borders.

6th. If this law had any such meaning (which we deny), it is no longer the law of Georgia, and its repeal has been recognized.

In 1895 the Legislature of Georgia adopted a new Code. This Code was compiled under authority of an Act of the Legislature, to be found in the Preface of the 1st volume of the Code of Georgia of 1895, page xx., which provided that

> "It shall be the duty and power of the Code Commis-

"sioners to codify and arrange in condensed form the "laws now in force in Georgia, from whatever source "derived."

After this Code was prepared, it was adopted by an Act of the Legislature, to be found in the same Preface, page xix., by which the said Code so prepared was adopted and made of force as the Code of Georgia.

This Code does not contain the 2d section of the Act of 1884-5, quoted by counsel for Appellant. It does contain the 1st section and the 3d section, which, as amended by a subsequent Act, are to be found in Volume 1, sections 833 and 834 of the Code.

Its omission is significant. It was not an oversight, as the codifiers had their attention upon the Act.

Learned counsel say in their supplemental brief that it is in substance in the Code, and that if not in the Code it is still the law.

We think it is *in substance* in the Code. We think that it did not change the former law, and was recognized by the codifiers as not changing the previous law laid down by the Supreme Court, distinguishing what stock was returnable for taxation, but as merely directing attention to the return of stock, for fear lest such stocks as were taxable, *as not representing fixed properties returned for taxation*, might be omitted, and that the codifiers did not consider it necessary to encumber the Code with it.

If this is not the case, then in so far as this section of the Act of 1884-5 changed the pre-existing law, the codifiers evidently considered it in conflict with subsequent legislation, and omitted it, and the Legislature adopted the Code with the 1st and 3d sections of the Act of 1884-5, and the 2d section left out.

Counsel for Appellant have quoted authority to the effect that law omitted from the Code, but not inconsistent therewith, is not repealed by the adoption of the Code.

The original Code of 1863 contained an express provision that such law should still remain of force, and such a provision was continued in the Code of Georgia for many years. It is noteworthy that no such provision is to be found in the Code of 1895, or in the Constitution of the State of Georgia, declaring what laws are of force in the State.

Code of Ga., 1895, Vol. I., Sec. 1.

Code of Ga., 1895, Vol. II., Sec. 5932.

But conceding that such is still the rule, the deliberate omission of a section of an act from the Code is certainly high evidence that it was either not considered to be the law when the Code was adopted, or that its provisions did not alter or add to the law as defined in other sections of the Code.

Mitchell vs. Railway Co., 111 *Ga.* 768, 769, 770.

5th. That none of the sections of the Code quoted as substantially embodying this second section of the Act of 1884-5 have any bearing whatever upon the question presented in this case, is evidenced by a very short analysis of them.

Section 833, Vol. I. of the Code, is merely the codification of certain questions relating to tax-payers, and is drawn from section 1st of the Act of 1884-5, page 28 (margin page 8 being a misprint), as amended by the Act of 1886. It clearly can not be considered as codifying the 2d section of the Act of 1884-5, when it expressly codifies the 1st section of the Act, and the amendment to said 1st section alone.

Section 2165, of Vol. II. of the Civil Code, has no bearing whatever upon the question of whether stock in a foreign corporation is taxable property, nor can it be a codification of the 2d section of the Act of 1884-5, for the reason that it is a part of the general law for the incorporation of railroads in Georgia, enacted by the Legislature in 1892, and provides that shares of stock in railroads located in Georgia, chartered under her general law, shall be personal property. Nobody contends that the Legislature of Georgia ever intended attempting to make such shares taxable property where she collects a tax upon the railroads located in her midst. It is also a mere repetition of Code, Section 3070.

Section 3070, of Vol. II. of the Civil Code, can not aid the question, as it is a section of the law which was in the original Code of 1863, and was in existence just as it now stands when the Supreme Court held in the case of *Wright, Comptroller-General, vs. Southwestern Railroad*, 64 *Ga.* 799, that stock in a railroad located out of the State was not property within the State of Georgia subject to taxation.

We conclude, upon the whole, that this Act does not aid in

any way in the elucidation of the question presented in this case; that it does not indicate what stocks were taxable, nor does it intend to change the law laid down by the Supreme Court of Georgia, that stocks representing fixed properties, where such properties are already taxed, are not property subject to be taxed.

7th. Respondent further shows that by the law of Alabama shares of railroad stock are situated in that State, and are personal property located there.

When a State gives *situs* to shares of stock, that place and not the residence of the owner is their location.

Jellenik vs. Huron Copper Mining Co., 177 *U. S.* 1.

The law of Alabama has the same provisions as to levy and sale upon shares of stock as are contained in the laws of Michigan in the case last above cited. Such stock may be attached or levied on under execution, by notification to the officer in charge of the books of transfer, and may be made in the county in which the corporation has its principal office or place of business.

Code of Alabama of 1896, *Sec.* 1265.

An administrator may be appointed for a non-resident in the county of the residence of a corporation in which his intestate owned stock, upon the theory that the property is located in such county.

Winter vs. London, 99 *Alabama*, 263.

These shares, therefore, if distinct property are property out of the State of Georgia, and not taxable by her.

8th. This case is not one of great magnitude, or involving the *collection* of the State's revenue in any great degree.

For nearly twenty years no effort was made to collect taxes on these shares.

The taxes due by Complainants and their lessor for 1900 were duly returned, the return accepted and the taxes paid, such return following the unbroken practice.

In May, 1901, the Comptroller-General demands taxes for 1900 on these shares, the accustomed taxes having been previously paid.

So that this is not the case of a question involving a stoppage of the State's fiscal system.

It is true that $150,000 is involved in *back taxes*,—but if obtained it will be a sort of *pick-up* for the State.

9th. It is not a case involving any wide application. It does not appear that any effort except to tax this Western Railway stock exists. (*Transcript, pp.* 14, 22.)

10th. It is not a case that commends itself. Two Georgia corporations, the Georgia Railroad & Banking Company and the Central Railroad & Banking Company, by permission of her laws acquired as tenants in common this railroad located in Alabama. It was taxable as such property where located.

For several years they ran it as tenants in common.

The Georgia Railroad & Banking Company leased its one-half interests to lessees. In 1882 these two owners obtained from Alabama a charter, and conveyed this road to this corporation, and equally held its stock. The Georgia Railroad & Banking Company turned over the control of the stock received by it under the lease to the lessees.

For years the taxes were paid as before on the property.

Georgia made no effort to claim any taxes on the stock.

Now, at this late day, her tax-gatherer attempts to claim back taxes on the ground that he has mistaken the law for years, and that the decision of her Supreme Court, rendered in 1880, has ceased to be law, although never overruled or drawn in question.

11th. Respondents also show as cause why this *writ of certiorari* should not be granted the reasons assigned and authorities cited in the briefs filed by counsel for Appellee in the Circuit Court of Appeals, which are herewith submitted as a part of this response.

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KING, SPALDING & LITTLE,
Solicitors for Respondents.

JOS. B. CUMMING,
ALEX. C. KING,
Of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS—FIFTH CIRCUIT.

WILLIAM A. WRIGHT, Comptroller-General, Appellant, vs. LOUISVILLE & NASHVILLE RAILROAD CO., and ATLANTIC COAST LINE RAILROAD CO., Appellees.	Appeal from the United States Circuit Court for the Northern District of Georgia.

BRIEF OF KING & SPALDING FOR APPELLEES.

STATEMENT OF THE CASE.

This cause originates in a bill in equity filed by the Appellees against the Appellant and the Georgia Railroad and Banking Company, a corporation created under the laws of Georgia, to enjoin the enforcement by Appellant, and the payment by the Georgia Railroad and Banking Company of an amount claimed as taxes, alleged to be due for the year 1900, on fifteen thousand (15,000) shares of capital stock of the Western Railway of Alabama, a corporation created under the laws of the State of Alabama. (Transcript, pp. 1-7.)

The case was tried upon the bill, the answer of the defendant, and an agreed statements of facts—the answer adopting said agreed statement of facts, and setting up that the bill made no case entitling plaintiff to relief; that there was no equity in the bill; that complainants had a complete remedy at law. (Transcript, p. 10.)

The case made by such pleadings and statement was as follows:

The Western Railway of Alabama is a corporation chartered under the general laws of the State of Alabama, owning and operating a railroad extending from Selma via Montgomery to West Point, in the State of Georgia. All of said road, except a quarter of a mile, lies in the State of Alabama. This quarter (1-4) of a mile lies within the State of Georgia, and was constructed under an Act of the General Assembly of Georgia, passed in the year 1837, authorizing the predecessor of said Western Railway of Alabama to build and operate said road in the State of Georgia; said Act being a public act, and being found in the published Acts of 1837, pages 201, 202. (Transcript, p. 12.)

This property, after some prior changes of ownership, was sold in 1875 under a mortgage foreclosure, and was purchased jointly by the Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia, two railroad corporations of the State of Georgia; such purchase being made by authority of a public act of the General Assembly of Georgia, authorizing said companies to make such purchase. See Acts of Georgia of 1875, pages 235, 236. (Transcript, p. 12.)

Said two last-named corporations held said railroad as tenants in common, and operated the same without further incorporating it, until a time subsequent to the 7th day of May, 1881. (Transcript, p. 13.)

On the 7th day of May, 1881, the Georgia Railroad and Banking Company entered into an indenture of lease with one, William M. Wadley, whereby it leased to the said Wadley, or assigns, for the term of ninety-nine (99) years from the 1st day of April, 1881, all of its rights of transportation and its railroads, describing the same therein, and also "all the rights of ownership, management, "control and use of the Western Railroad of Alabama, which the "(said Georgia Railroad and Banking Co,) now has, or is entitled "to," &c. (Transcript, pp. 11, 22, 24.)

By said lease it was further provided that the said Georgia Railroad and Banking Company "will consent to the organization of "the owners of the Western Railroad of Alabama into a corpora- "tion; * * * * *provided*, the said incorporation shall not impair "the beneficial ownership of said railroad by the (Georgia Rail- "road and Banking Co.)" (Transcript, p. 27.)

Subsequently, in 188—, in accordance with the stipulations of said lease, a charter was applied for, and a certificate of incorporation issued by the Secretary of State for the State of Alabama, conformably to its general law, incorporating the Western Railway of Alabama. To that corporation the Georgia Railroad and Banking Company, and The Central Railroad and Banking Company conveyed the said Western Railroad of Alabama, extending from Selma, Ala., via Montgomery, to a connection with the Atlanta and West Point Railroad, in the city of West Point, Georgia, receiving from said new corporation thirty thousand (30,000) shares of its capital stock of one hundred ($100.00) dollars each, aggregating three million ($3,000,000) dollars; each of said corporations so conveying said railroad receiving fifteen thousand (15,000) of said shares. Said Western Railway of Alabama owns no property in the State of Georgia, except the small portion of railroad hereinbefore set out, located in the county of Troup, State of Georgia. (Transcript, p. 13.)

Said 15,000 shares of stock "were issued to and stand in the "name of the Georgia Railroad and Banking Company, but an "irrevocable power of attorney or proxy to vote the same has at all "times been issued and existed under said lease in favor of the les- "sees or assigns, or such person as they might designate to vote said "shares." (Transcript, p. 13.)

It was further agreed that by different assignments of the lease the Louisville and Nashville Railroad Company became the sole assign of said lease, and became the lessee of said leased property

and interests described therein, in lieu of the said Wadley, and was accepted by the Georgia Railroad and Banking Company as such sole lessee, and after being so accepted deposited one million ($1,000,000) dollars of securities acceptable to the Georgia Railroad and Banking Company, to secure the faithful performance of said lease according to the covenant made in said lease in respect to making such deposit. (Transcript, p. 11.)

For the covenant of said lease so requiring, see (Transcript, p. 28.)

Subsequently, the Atlantic Coast Line Railroad Company acquired a half interest in said lease from said Louisville and Nashville Railroad Company, and was accepted by said Georgia Railroad and Banking Company as a co-lessee with said Louisville and Nashville Railroad Company, and the Appellees are now co-lessees of said lease, and hold the same as fully and to all intents and purposes as did the said William M. Wadley. (Transcript, pp. 11, 12.)

Neither the Georgia Railroad and Banking Company nor its lessees have at any time paid any taxes on the shares of stock of the Western Railway of Alabama, issued as aforesaid. (Transcript, p. 12.)

The Western Railway of Alabama has paid to the State of Alabama all State and county taxes which have been demanded of it by said State. (Transcript, p. 12.)

About the 15th day of May, 1909, the Appellant specifically demanded of the Georgia Railroad and Banking Company that it pay taxes on said shares of stock for the year 1909, to the State of Georgia; which said sum so demanded amounts to between $7,000 and $8,000. (Transcript, p. 13.)

The blanks sent annually by the Comptroller-General to the Georgia Railroad and Banking Company to use in making its re-

[illegible] consists, among others, the following questions, to wit: "Number stocks and bonds owned by the company;" and "value of "all property not enumerated, and value of same."

[illegible] no other way than in furnishing [illegible] the Comptroller-General make demand for [illegible] and shares of stock, until about the 30th day of May, 1891, when he made the demand last above mentioned. (Transcript, 12, 20.)

[illegible] Under the Statutes of Georgia regulating railroad taxation, all [illegible] taxable by railroads, whether State, county or municipal, are required to be assessed to the [illegible] corporation owning the [illegible].

Code of Ga., sec. 1, secs. 590, 592, 596;
Railroad Co. vs. Wright, 69 Ga., 192.

It further appears, "That whatever sum or sums of money [illegible] "said Georgia Railroad and Banking Company, and known as [illegible] "ceipts for the same to said Georgia Railroad and Banking Com- "pany, without in any way diminishing the exact value [illegible] "by said assessment and [illegible]." (Transcript, p. 21.)

It was also agreed "That stockholders in the Atlanta and West "Point Railroad Company, the Georgia Railroad and Banking "Company, the Augusta and Savannah Railroad Company, and of "all corporations whose property is not assessed [illegible] "own [illegible] shares of stock for taxation." (Transcript, p. 21.)

It will [illegible] that complainants herein, the present [illegible] were without legal remedy to avoid the payment of said alleged taxes if so [illegible], and would be without remedy unless granted relief in the present proceeding. That under the laws of Georgia [illegible] of such sum can [illegible] and [illegible]

lant was proceeding without law, or color of law, in attempting to collect the same. That such attempted collection and the enforcement of such pretended taxes would take their property without due process of law, and deny to Appellees the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States. That there was no law in the State of Georgia authorizing the taxation of railroad shares of stock in the hands of the owners thereof. That under such law shares of railroad stock are mere representations of the railroad property itself, and such property must be taxed where located in Georgia, and, where not so located, is not subject to be taxed by the State of Georgia.

That the taxation of said shares would be taxation by the State of Georgia of property located in the State of Alabama.

That the State of Georgia does not tax under its law shares issued by railroad corporations of the State, but recognizes the same as mere certificates of interest in the railroad property, which is itself taxed, and that there is no law of the State creating any other or different rule for railroad shares issued upon properties lying without the State. (Transcript, pp. 5, 6.)

The bill prayed that the shares of stock be decreed to be not subject to taxation; that the Georgia Railroad and Banking Company be enjoined from returning the same for taxation or paying taxes thereon; that William A. Wright be enjoined from issuing any execution or taking any steps to collect said taxes, and be decreed to be without warrant or authority of law so to do. The prayer was also for general relief. (Transcript, p. 7.)

On the hearing the Court held that under the law of Georgia shares were but representations of the railroad property, and that foreign railroad shares were not subject to be taxed, and enjoined the defendants as prayed. (Transcript, pp. 11, 15, 20.)

Appellant thereupon appealed to this Court.

ASSIGNMENT OF ERRORS.

The errors assigned are:

1st. The overruling of the grounds of demurrer in the answer:

(*a*) That there was no equity in the bill, nor case made for equitable relief;

(*b*) That complainants were without sufficient interest to sue.

2d. Holding that the stock was not taxable in this State.

3d. Holding said shares a mere representative of the railroad property itself, and not taxable.

4th. Enjoining the Appellant from undertaking to collect said alleged tax.

5th. Enjoining the Georgia Railroad and Banking Company from paying any tax on said stock. (Transcript, pp. 32, 33.)

BRIEF OF ARGUMENT.

I.

Where a right is created by the State law in favor of its own citizens, the Federal Courts can enforce the same by appropriate remedies, at the instance of a citizen of another State.

"1. Whenever a citizen of a State can go into the courts of the "State to defend his property against the illegal acts of its officers, "a citizen of another State may invoke the jurisdiction of the Fed- "eral Courts to maintain a like defense. A State cannot tie up a "citizen of another State having property rights within its territory "invaded by unauthorized acts of its own officers, to suits for re- "dress in its own courts. Given a case where a suit can be main- "tained in the courts of the State to protect property rights, a citi- "zen of another State may invoke the jurisdiction of the Federal "Courts. *Cowles* vs. *Mercer County*, 7 *Wall*, 118; *Lincoln County*

"vs *Lunning*, 133 *U. S.* 529; *Chicot County* vs. *Sherwood*, 148 *U.*
"*S.* 529."

Reagan vs. *Farmers Loan & Trust Co.*, 154 *U. S.* 362, 392.

2. Under the practice and procedure in Georgia injunction is a proper remedy to prevent the assessment, or collection, of an illegal tax.

Where land is levied upon by the tax-collector of one county as being located therein, when the true boundary of the county shows it lies in the second county, "the tax-collector of the other county may "be restrained by injunction from collecting the taxes which would "be due to it were the tract in that county, but which are not due "because of its being in the adjoining county."

Smith, tax-collector, vs. *Dees*, 92 *Ga.* 549.

Where the provisions of a city charter requiring tax-assessors to assess all realty according to its market value on the first day of a certain month, and also requiring the return of all personalty owned by the taxpayer on the 15th of that month, are enforced so as to levy a tax on the vendor of land, both as to the realty sold and as to the proceeds of sale in cash or notes, such enforcement of the city charter should be restrained by injunction.

"Having applied to the assessors, who refused her application, "and having applied to the mayor and council, who failed and neg-"lected to act upon her petition, she had no other recourse against "this illegality than to seek an injunction from a Court of Equity."

Sheibley vs. *Rome*, 107 *Ga.* 384, 385-6.

An injunction is an appropriate remedy to restrain the Comptroller-General from proceeding prematurely with the issuance of a tax execution against a railroad company.

Wright, Comptroller-General, vs. *Railroad*, 85 *Ga.* 649, 650.

"Where any ministerial officer of this State is attempting to col-"lect money out of a person, natural or artificial, under the forms

"of law, but without any valid law to authorize the process he uses "and calls an execution for taxes, it is the duty of the courts, in a "proper case made, to arrest the proceedings in some of the modes "known to the law, and afford relief to the party justly complaining.

"Equity has jurisdiction to interfere in behalf of any person, "natural or artificial, entitled to relief on the following grounds: "(1) Where exactions are pressed in the form of annual taxes, in- "consistent with, and violative of, legal rights. (2) Because the "exactions might be repeated and wrongs multiplied."

Southwestern Railroad vs. *Wright, Comptroller-General*, 68. *Ga.* 311, 320.

Where a tax has been illegally imposed, and is illegally in process of collection by the tax-collector of a county, an injunction should be granted.

S. F. & W. Ry. vs. *Morton et al.*, 71 *Ga.* 24, 25.

Where there is no authority of law for the collection of a tax, an injunction is an appropriate remedy to prevent collection.

Staten vs. *S. F. & W. Ry.*, 111 *Ga.* 803.

It is therefore apparent that the settled remedy in Georgia, and in the courts of that State, to prevent the collection of an illegal tax, where the officer has no authority to levy or collect the same, is in equity and by injunction.

The statutory remedy provided for meeting the levy of a railroad tax execution issued by the Comptroller-General, is one known as an affidavit of illegality.

Code of Ga. of 1895, *vol. I., secs.* 782, 789.

The affidavit of illegality is in its essence an equitable proceeding to restrain the progress of an execution, and its complement in the courts of the United States is a proceeding in equity to restrain.

"Illegalities are equitable proceedings, at least in the nature of "equitable proceedings."

Higgs vs. *Huson*, 8 *Ga.* 319.

Where there is no adequate and complete remedy on the law side of the courts of the United States, a party may sue on the equity side, even when a complete remedy is furnished by the law of the State in the State Courts.

Nat. Bk. of N. O. vs. *Bohne*, 4 *Woods*, 74.

II.

Where the remedy at law is not as complete, or where a cloud upon the title might be produced, the remedy is in equity.

"Courts of Equity undoubtedly have jurisdiction to hear com-"plaints of those who assert that their lands are about to be assessed "and subjected to liens by a Board of Commission acting in pursu-"ance to the provisions of a statute which has been enacted under "the forms of law, but which is unconstitutional, and therefore does "not avail to confer the powers sought to be exercised. *Dows* vs. *Chi-"cago*, 11 *Wall*, 108; *Union Pac. Railway* vs. *Cheyenne*, 113 *U. S.* "516; *Ogden City* vs. *Armstrong*, 168 *U. S.* 224; *Dillon's Mun. Cor-"porations, vol. 2, sec.* 833, *4th Ed.*"

Wilson vs. *Lambert*, 168 *U. S.* 611, 612.

In the case last cited the board was proceeding without any law (because an unconstitutional statute is as though there was no statute). In this case, as we shall show hereafter, the Comptroller-General is undertaking to proceed without any law, as the statutes of Georgia do not embrace shares of stock in railroad corporations, either within or without the State.

Nevertheless, in this case if the Comptroller-General should make an assessment of these taxes and issue an execution upon the same against the Georgia Railroad and Banking Company, and levy upon some of its property in the State and sell it, the issuance of such an execution would *prima facie* constitute a general lien upon all of its property.

Says the statute: "On failure to pay the taxes so assessed, the "Comptroller-General shall proceed to enforce the collection of the "same in the manner provided by law for the enforcement of taxes "against the other incorporated companies before mentioned."

Code of 1895, *vol. I., sec.* 781.

"If any corporation, company * * * * * * * where required to "make their returns to the Comptroller-General, shall fail to re- "turn the taxable property or specifics, or pay annually the taxes for "which they are liable to the State Treasurer, the Comptroller- "General shall issue against them an execution for the amount of "taxes due, according to law, together with the costs and penalties."

Code of 1895, *vol. I., sec.* 874.

"The property returned or held at the time of giving in, or after, "is always subject (to the lien of taxes). A sale of property under "any other process does not divest the lien of the State for taxes."

Code of 1895, *vol. I., secs.* 883, 884.

"The deed or bill of sale (made under the tax execution) shall be "just as valid to the purchaser as if made under the ordinary proc- "ess of law issuing from the Superior Court."

Code of 1895, *vol. I., sec.* 913.

This section applies to sales under tax executions issued by the Comptroller-General.

Bedgood vs. *McLean*, 89 *Ga.* 793.

Were the Comptroller-General, therefore, to assess these taxes, and levy an execution for the same, and property to be sold thereunder, the purchaser's deed, with the Comptroller-General's execution, would constitute a good *prima facie* title, and it would be necessary to go into parol to show how the alleged tax originated, and on what property, in order to impeach the apparent validity of the tax execution as a lien clouding all of the leasehold estate of the complainants, or in order to impeach any deed which might be made under such execution, as constituting a cloud upon the title to such property so sold. In such case the remedy at law is not complete, and equity has jurisdiction.

Dows vs. *Chicago*, 11 *Wall*, 198.

Hannewinkle vs. *Georgetown*, 15 *Wall.* 547.

Ogden City vs. *Armstrong*, 168 *U. S.* 224, 238.

Again, in this case the matter would be further complicated by the fact that the Comptroller-General is proceeding against the lessor company, while the lessees are the real parties at interest, under the agreed statement of facts.

"Where the remedy at law is plain, equity will not interfere if the "remedy is also adequate and complete; but, if the remedy at law "is doubtful, the Court of Equity will retain the case, and if the "proofs are satisfactory, will grant relief."

"Jurisdiction to a partial extent may exist at law; but, if the "remedy there is not adequate—that is, if the party cannot attain "at law the full justice of the case—he may, if he sees fit, pursue "his remedy in equity. Nor is the Court of Equity closed to the "party unless the remedy at law is complete, and will secure to the "party the whole right involved in a manner as just and perfect as "would be attained in a suit in equity. 1 *Story's Eq., sec.* 33; *Ins. "Co.* vs. *Bailey*, 13 *Wall.* 621."

Clements vs. *Macheboeuf et al.*, 92 *U. S.* 418.

III.

The Appellees are vitally interested in the question of whether these alleged taxes can be lawfully assessed. They are the payees of all such demands.

1. The agreed statement of fact shows their interest in the matter. (Transcript, pp. 11, 12, 14.)

Again, the bill avers, and the answer does not deny, that a levy or sale to collect same, would be of the leased property, and would destroy or impair their enjoyment thereof.

Under the Georgia Code the party entitled to the use of property, such as the life tenant, tenant for years, &c., is the primary taxpayer.

Code of 1895, *vol. 1., sec.* 778.

Where one has an interest in the subject-matter he can maintain such litigation.

2. But in this case the Georgia Railroad and Banking Company has consented to an incorporation, subject alone to such incorporation not impairing the beneficial ownership of said Western Railroad by such Georgia Railroad and Banking Company. (Lease, Transcript, p. 27.)

The lessees are vested with "all the rights of ownership, manage-"ment, control and use of the Western Railroad of Alabama, which "the party of the first part (Ga. R. R. & Bgk. Co.) now has or is "entitled to." (Lease, Transcript, p. 24.)

We insist that this constitutes the lessees the owners of this stock, subject alone to protecting the beneficial ownership of said lessor after the expiration of said lease.

IV.

The effect of taxing shares of stock in the hands of shareholders, and the property of the corporation in its hands, is double taxation. Every presumption is against the intention to so double tax.

1. "The same may be said of a tax on the property of a corpora-"tion, and also on the capital which is invested in the property. If "the latter is taxed as property, this also is double taxation. "* * * * * When, for instance, the money paid in as capital of "a manufacturing corporation has been invested in buildings and "machinery, these are what then represent the capital, and to tax "the capital as valuable property, distinct from that which then "represents it, would be to tax a mere shadow. It would be to "make the shadow stand for the substance, in order that it might "be taxed, when the substance itself is taxed directly under its own "proper designation."

Cooley on Taxation (2 *Ed.*), *p.* 225.

"The most objectionable feature of a tax levy on shares of stock is "that almost inevitably it operates to impose a double tax on a "part or all of the shareholders. Such double tax exists where "either the corporate realty, or personalty, or franchise, or capital "is taxed, and a tax is also levied on the shares of stock without any "deduction for the former taxation. * * * * * The injustice of

"such taxation, however, generally prevents its occurrence. The "Courts also do their utmost to prevent double taxation, and will "construe a taxation statute so as to avoid such a result, and some- "times even in opposition to the plain words of the statute itself."

Cook on Stock and Stockholders (3 *Ed.*), *sec.* 567.

The Supreme Court of the United States, while recognizing the power of a State to tax the property of a corporation in its hands, and the shares of the capital stock in the hands of the individual shareholders, say:

"It is no doubt within the power of a State when not restrained "by constitutional limitations, to assess taxes upon them in a way to "subject the corporation or the stockholders to double taxation. "Double taxation is, however, never to be presumed. Justice re- "quires that the burden of government shall, as far as is practicable, "be laid equally on all, and if property is taxed once in one way, it "would, ordinarily, be wrong to tax it again in another way, when "the burden of both taxes falls on the same person. Sometimes tax "laws have that effect, but if they do it is because the legislature "has unmistakably so enacted. All presumptions are against such "an imposition."

Tenn. vs. *Whitworth*, 117 *U. S.* 129, 137.

2. The argument of Appellant is that because the State could, by express legislative enactment, create shares of stock, which are but an intangible evidence of the interest in the corporate property, into such separate, distinct, taxable property, that therefore it must follow that the State of Georgia has recognized and created shares of stock as taxable property, distinct from the property of the corporation of which they are the symbol.

We do not deny that Georgia could enact that corporations should pay taxes upon all their property. Further, could enact that shares of stock of corporations should be considered as separate and distinct property in the hands of the shareholders, and as such taxable. We, however, insist most confidently that Georgia has done no such thing. On the contrary she has by uniform decisions of her Courts recognized that the property of a corporation and the shares of stock

evidencing the interest of its members in such corporation are no more different values than the land which one of her citizens may own, and the deed which he may hold evidencing his ownership therein.

We further insist that corporate shares are of such a character that it is entirely competent for the State to recognize that they and the property of which they are the representatives constitute but one taxable subject, and that a failure to tax such shares, or a declaration that they are but symbols, and not taxable property, is not an exemption, but the mere adoption of one of the two doctrines which prevail in regard to the true *status* and nature of shares of capital stock.

3. It is admitted that Georgia rightly recognizes that the property of her corporations located in the State and the shares of the stockholders therein are but one and the same value, and that she does not attempt to tax one where the other is taxed.

It is further conceded that such double taxation would be unjust, for the reason that where the property has paid its taxes, the shares are but the symbol thereof, and the essential value has already contributed to the public good.

Why are shares less a symbol, in the absence of legislation expressly providing otherwise, because the corporation lives out of the State? If shares are a symbol of property where they represent an interest in a Georgia corporation, it would seem that shares in a corporation which does its business in another State, derives its franchises from another State, holds its property in another State, when held in Georgia, are nothing but the symbol of property located in another State.

They do not in this last case, even derive franchise or business value from the laws of Georgia, or protection from her government. Therefore upon principle, in the absence of compelling authority, there would seem to be no reason why shares of corporations in the State should pay no taxes, and shares of like corporations chartered elsewhere should be taxed.

Cook on Stock and Stockholders (3 *Ed.*), *sec.* 565.

V.

The State of Georgia has always declared the capital of a corpora-

tion and the shares of its stock to be one and the same thing for purposes of taxation, and further that shares of stock in corporations whose property is located out of the State are not themselves property within the State of Georgia, or subject to taxation.

As early as 1832 it was held that where bank stock is taxed in the hands of the holder, the corporation should not be taxed upon the capital which that stock represents, and that no intention to do this should be drawn from a tax act unless by express words or necessary implication.

Bank of State of Ga. vs. *City of Savannah, Dudley's Reports,* 130.

Where a provision of a railroad charter provided that the stock of a railroad company should not be liable to any greater tax, duty or imposition than that on banks, it was held that stock includes the property of the company.

Rome Railroad Co. vs. *City of Rome,* 14 *Ga.* 275.

Goldsmith, Comptroller-General, vs. *Rome R. R. Co.,* 62 *Ga.* 473, 482.

The exact question in this case, however, both as to stock of railroads within the State of Georgia, and stock of a railroad company situated without the State of Georgia, came before the Supreme Court in the year 1880.

"(*a*) Stock in the company's own road, held by itself, or in other "roads in this State, whose charters limit or exempt taxation there- "on, and whose income is taxed, is not liable; and stock held by the "company in railroads without the limits of this State is not tax- "able here. Stock in a railroad is really but so many shares of its "property, and that property is real estate, for the most part at least, "and taxable by the State in which the road is located."

"(*b*) But bonds, notes, and all other mere evidences of debt fol- "low the *situs* of the creditor, no matter where the debtor lives."

Wright, Comptroller-General, vs. *Railroad Co.,* 64 *Ga.* 783, 799.

This is not *dicta*, but the record in this case shows the point was necessarily involved.

This would seem to settle both the *status* and the *situs* of railroad shares for the purpose of taxation in Georgia.

VI.

The Constitution of Georgia of 1877 *does not invalidate this decision.*

The above decision was rendered in litigation between the Southwestern Railroad Company and the State of Georgia in regard to the taxes claimed to be due for the years 1876 and 1877. (See 64 Ga. 784.)

Appellant claims that the provisions of the Constitution of 1877, adopted after the taxes of that year had accrued, changed this decision, and required the taxation of capital stock. That provision of the Constitution is as follows:

"All taxation shall be uniform upon the same class of subjects, "and *ad valorem* on all property subject to be taxed within the ter- "ritorial limits of the authority levying the tax, and shall be "levied and collected under general laws."

Constitution of Ga. of 1877, *Art.* 7, *sec.* 2, *par.* 1, *Civil Code, sec.* 5883.

The former constitutional provision which was in force when the above decision was made was as follows:

"Taxation on property shall be *ad valorem* only, and uniform on "all species of property taxed."

Constitution of 1868, *Art.* 1, *Par.* 27.

The courts have held that all property, both real and personal, which is not expressly exempted from taxation, constitutes but one class, must be uniformly taxed, and that the taxation must be *ad valorem*.

Atlanta vs. *Stewart*, 109 *Ga.* 80, 96, 97.

It will be observed, however, that these provisions do not undertake to define *what is property within the territorial limits* of the authority levying the tax.

It undertakes to make no change in the decisions recognizing shares of stock not as property, but as mere evidences of the interest in the property of the corporation itself; so that the question at last is unaffected by the provisions of the Constitution, and recurs; whether under the law of the State of Georgia as declared by her courts, shares of stock are necessarily property different from the property held by the corporation, or are, like a bill of lading, a warehouse receipt, or other symbol, mere representatives of such property.

We answer these questions in the language of the Supreme Court of Georgia above quoted:

"Stock in a railroad company is really but so many shares of its "property, and that property is real estate, for the most part at "least, and taxable by the State in which the road is located."

Again, "stock * * * in railroads without the limits of this State "is not taxable here."

64 *Ga.* 799.

The decision from the 109 Ga., above cited, which is relied upon by the Appellant, expressly declines to decide to the contrary, and recognizes that it may be competent to provide against taxing the shares of stock, where all the property which gives them value has been taxed, and indicates that the contrary might be claimed to be double taxation.

109 *Ga.* 98.

The State of Georgia further recognizes this by the provisions of her Code, re-adopted in 1895.

"Bonds, notes, or other obligations for money, on persons in other "States, or of other States, or *bonds of corporations of other States*, "and shipping, are the subject of return and taxation in this State."

Code of 1895, *vol. I., sec.* 776.

The use of the words "bonds of corporations," without including the word "stocks," is significant,—especially when construed in the light of the above decision of the Supreme Court in regard to the non-taxable character of stock representing an interest in a foreign railroad, and the clause in said decision which provides that bonds

follow the *situs* of the holder.

64 *Ga., supra.*

VII.

Where Constitutions prohibit exemptions, and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed, are valid, and where such Constitutions prohibit double taxation, are generally imperative.

If shares of stock are separate property from capital representing the same, held by the corporation, then of course it makes no difference where the corporation is located,—an exemption of such shares from taxation because the corporate property is taxed would violate a constitutional provision prohibiting the exemption of property. On the other hand, if such shares of stock can be regarded as mere symbols of property within the State in the hands of her own corporations, they can necessarily be regarded as symbolic of property without the State, and as therefore not representing property within the limits of the taxing power.

Mr. Thompson, in his work on corporations, recognizes the existence of a line of decisions which hold:

"Where a tax is laid upon the property of a corporation, whether "in the name of capital or in the form of a tax upon the tangible "property into which its capital has been transmuted—another tax "assessed against the shareholders upon the shares held by them of "the capital stock of the corporation, is double taxation and not per-"missible."

2 *Thompson on Corporations, sec.* 2813.

The identity of the shares and of the capital of a corporation is recognized by the Federal Government in its provisions regarding the taxing of National Bank stock.

2 *Thompson on Corporations, sec.* 2814.

Under a constitution which provides for taxing the property of corporations, the same as individuals; and, further, that uniform laws shall be passed taxing investments in bonds, stocks, &c., it is

held, that to tax both the stock in the hands of the shareholder and the property of the corporation is inconsistent, because unequal taxation.

Cleveland Trust Co. vs. *Lander*, 56 *N. E. Rep.* 1036, 1040.

Says the Supreme Court of California, speaking of her Constitution, which prohibited exemptions from taxation, required uniform taxation, and prohibited double taxation:

"Now, what is the stock of a corporation but its property, consisting of its franchises and such other property as the corporation may own? When, therefore, all the property of the corporation is assessed * * * * then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with. * * * * The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation."

People vs. *Badlam*, 57 *Cal.* 594.

Waterworks vs. *Schottler*, 62 *Cal.* 69.

Says the Supreme Court of Pennsylvania:

"Such taxation (viz.: on the capital and the shares in the hands of the holders), notwithstanding the subtle distinction of the Court below, would be substantially double taxation. Conceding the power of the legislature to tax in this manner, its exercise is never to be presumed. The intent to impose double taxation must be clearly expressed."

Penna. Co. &c. vs. *Commonwealth*, 15 *Atlantic Rep.* 456, 458.

The Constitution of Indiana, section 1, article 10, directs that the legislature shall provide by law for a uniform and equal rate of assessment and taxation. It also provides for the taxation of all property except certain property therein excepted. Under such constitution, the Supreme Court of Indiana has held that a provision prohibiting taxation of shares of capital stock where that which gives it its value has already been taxed in the hands of the corporation, is not an exemption, but the prohibition of double taxation.

Hyland vs. *Central Iron & Steel Co.*, 13 *L. R. A.* 515.

An act providing for taxing the property of a corporation, and providing that its shares of stock shall not be taxed, is not unconstitutional under a constitution providing that all property shall be taxed equally and prohibiting legislative exemptions. Such a provision "is not in fact an exemption, but only a different mode of "assessment of property."

Carroll vs. *Alsup et al*, 64 *S. W. Rep.* 193.

See also to the same effect:

Lewiston Co. vs. *Asotin County*, 64 *Pac. Rep.* 544.

Foster vs. *Stevens*, 13 *L. R. A.* 166, 169.

Bank vs. *Nashua*, 46 *New Hampshire*, 389.

Sherman vs. *Kimball*, 54 *New Hampshire*, 406.

It may be of advantage to consider that the State of Alabama taxes railroad properties not upon the value of their property as so much material, but upon the full value of the railroad as a going concern.

Code of Alabama of 1896, *sec.* 3972.

VIII.

Taxation is never levied by presumption.

No statute of the State of Georgia can be pointed to which expressly levies a tax on corporate stock of a foreign corporation in any different manner from the way in which taxes are levied upon stock of like corporations in this State.

The only line of statute law dealing with this subject, is the question propounded to the taxpayer, inquiring what shares of stock in corporations not chartered by the State he owns. It is an inquiry, and not an assessment or a levy.

It can serve a useful purpose without altering the law as to taxation of shares of stock. By revealing what shares of stock he holds in companies not chartered in Georgia, it enables the tax-assessor to learn if the taxpayer holds shares in such companies, which do not return their capital for taxation at home, but whose shareholders individually return their shares where they reside. Georgia taxes

shares of this description in her domestic corporation, and has always taxed such shares held by her citizens in foreign corporations —but never has taxed shares in either, where the corporation returns all of its property for taxes.

"The subject is not to be taxed unless the language of the statute "clearly imposes the obligation; for taxes are not imposed by impli- "cation."

Endlich Interp. of Statutes, sec. 345.

IX.

The rule of property, or of taxation, established in a State by the decisions of her Courts, will be followed by the Federal Court in dealing with such property or taxation.

1. In this case the Supreme Court of Georgia has established as a rule of property, that shares of railroad stock represent the property of the corporation. That such property is the subject of taxation, where located either within or without the State, but not the shares, which are mere representatives thereof.

Railroad Co. vs. *Wright*, 64 *Ga.* 783, 799.

Where a rule of property is established by the State decisions, it will be followed by the Federal Courts.

Foster vs. *Elk Ford &c. Co.*, 32 *C. C. A.* 560.

Buford vs. *Kerr*, 38 *C. C. A.* 166.

Warburton vs. *White*, 176 *U. S.* 484.

2. The decisions of the State Courts as to State taxation, where not impairing some right claimed under the Constitution of the United States, will be followed by the Federal Court.

Lewis vs. *Munsen*, 151 *U. S.* 545, 549.

Bardon vs. *Land & R. Imp. Co.*, 157 *U. S.* 327, 331.

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M. A. WRIGHT, COMPTROLLER GENERAL,
APPELLANT,

vs.

E LOUISVILLE & NASHVILLE RAILROAD
COMPANY AND

E ATLANTIC COAST LINE RAILROAD CO.,
APPELLEES.

In the Circuit Court of Appeals.

For the Fifth Circuit.

APPELLEES' STATEMENT OF THE CASE.

The Georgia Railroad and Banking Company and the Central Railroad and nking Company of Georgia were equal owners, as tenants in common, of e Western Railway of Alabama.

May 7, 1881, The Georgia Railroad and Banking Company leased its railroad perty, including its half interest in the Western Railway of Alabama, to illiam M. Wadley and his assigns, for a term of ninety-nine years. By dif-ent assignments the appellees have become the lessees, and were such when tax in question was demanded.

Said Western Railway of Alabama lies in the State of Alabama except one arter of a mile in the city of West Point, Georgia.

The two above named owners of said Railroad held the same without any arter or act of incorporation until the———day of 188— when they were orporated by the laws of Alabama under the name of The Western Railway Alabama Company. The property was divided into 30,000 shares of $100 ch, and each owner received 15.000 of said shares, but the shares received The Georgia Railroad and Banking Company were covered by said Lease d enjoyed by the Lessees.

While The Georgia Railroad and Banking Company had leased all its perty, the same was returned in its name and by it to the Comptroller neral under the laws of Georgia for taxation.

The blank, annually furnished by the Comptroller General to The Georgia ilroad and Banking Company to be used in making its tax returns, contained ongst others, the following question, to wit: "Number of stocks and bonds ned by the company and value of all property not enumerated and value of ch?" In no other way than in furnishing these blanks did the Comptroller neral make any demand for taxes upon said fifteen thousand shares of stock til about the 25th day of May, 1901, when he specifically demanded of The orgia Railroad and Banking Company that it pay taxes on said shares of ck for the year 1900 to the State of Georgia, which said taxes so demanded ounted to between $7,000 and $8,000.

It is provided by the aforesaid Lease that whatever taxes are collectible on d stock during the entire term of the lease are payable by the lessees; or if same are lawfully collected from The Georgia Railroad and Banking Com-y, the lessees are bound to reimburse said last named company without deduction from the rent, which said lessees pay.

The stockholders in the Atlanta and West Point Railroad Company, T Georgia Railroad and Banking Company, The Augusta and Savannah Railro Company and in all corporations, which pay taxes upon their property to t State of Georgia, do not return their shares of stock for taxation.

The corporation, The Western Railway of Alabama, has regularly paid State and County taxes required of it in the State of Alabama.

The Comptroller General of the State of Georgia, on the failure of T Georgia Railroad and Banking Company to pay taxes for the year 1900 said 15,000 shares of stock, threatening to issue execution against said Co pany as the owner of said shares for said taxes, Appellees filed their bill agai him and also against The Georgia Railroad and Banking Company to enj the collection, alleging as to the last named defendant that it would either p the tax and call upon appellees to refund the same, or it would permit t leased property to be taken in execution and sold for payment of the same and thereupon applied for an injunction against both defendants.

On the hearing of the cause the Circuit Court granted the injunction a made the decree which is here appealed from.

BRIEF AND ARGUMENT OF JOS. B. CUMMING, FOR APPELLEES.

It is not out of place to point out in the beginning of this Brief and Arg ment what propositions appellees do *not* assert.

They do not contend that double or duplicate taxation is illegal.

They do not contend that the legislature of Georgia has not the power tax corporate property and also the shares, into which the corporate proper is divided, in the hands of the shareholders; although perhaps the negative this proposition might be maintained in the light of the comparatively rece decision in the case of Sheibley vs. Rome, 107 Ga., 384.

They do not contend that there is any property in Georgia (other than th expressly exempted by the State Constitution) not liable to be taxed once.

Whenever authorities are cited in this Brief on the subject of double tax tion, they are offered for the purpose of assisting in reaching a conclusion the controlling question in the case on its merits, which question is:

Has any competent authority in the State of Georgia levied a tax on the shares of stock in the hands of the shareholders?

For its bearing on this question, is also the discussion in this Brief of t question of *situs*.

Also for its bearing on this main question is the discussion in this Brief the subject of *uniformity*.

RULES OF CONSTRUCTION OF TAX ACTS UNFAVORABLE TO VIE THAT THE TAX HAS BEEN IN FACT LAID ON THESE SHARES.

DOUBLE TAXATION.

The proposed tax is subject to all the practical and essential, though, acco ing to some authorities, not to the technical legal, objections, applicable to double tax. The feature which brings such taxation into disfavor in the

of the law, viz.: the fact that the same property bears directly or indirectly a double burden, is prominent in the proposed tax.

That the proposed taxation is double taxation, practically and essentially, cannot be doubted. The railroad in Alabama is valued at three million dollars. This property thus valued is divided into thirty thousand shares of one hundred dollars each, and these shares given to the citizens of Georgia. This process does not add a dollar to the property. Whatever may be the subtle and metaphysical distinction, which the books make between corporate property and the shares of corporate property, and whatever declaration the books may make that there are two properties and two distinct ownerships, the practical fact remains, that there is but one substance, and this practical fact is recognized by the State of Georgia as above indicated, and most distinctly in the Southwestern Railroad case; 64 Ga., 783.

The value taxed is $3,000,000.

The Alabama tax reaches this whole value. If the Georgia tax is levied, it is on the same value. It is not the case of the Alabama tax resting on the corporate property valued at $3,000,000 and the Georgia tax resting on *another* value of $3,000,000 in the shares. But there is but one value, and not two values of $3,000,000 each. In other words, here is a tax for six millions laid on a three million value; or, to express it in another way, it is two taxes laid on one value—that value being $3,000,000.

There is no natural merit in the reply, which may be made to the charge of double taxation, that the State of Georgia imposes but one tax and the State of Alabama imposes the other. The result is that *the citizen of Georgia*, the subject of the operation of the laws of Georgia, will pay a double tax, if his shares are taxed. A tax upon the corporate property in Alabama equalizes him with the Georgia stockholder, whose corporation is taxed in Georgia. At this point they are equal; but the moment his *shares* are taxed, he becomes the only doubly taxed citizen in the State. The tax upon his *property* is a tax upon *him*.

"The tax is a contribution required of the citizens by the State, and when it is measured, as to its amount, by the value or the productiveness of the property, is still a tax on the person, and there is a personal liability on the person assessed with the tax. The individual and not the property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax, with which the owner must be charged. The tax is imposed on the person of the owner on account of his ownership of the property."

Burroughs on Taxation, Sec. 7.
Rundell vs. Lakey, 40 N. Y., 513; 517.

The State of Georgia has always regarded the taxation of both the corporate property and the shares, representing the interest of the shareholders of such property, as double taxation.

In the Bank of Georgia vs. Savannah, Dudley, 132, a case reported before the creation of the Supreme Court, but cited with approval by standard writers on taxation, it was said: "It is a principle of common justice that the same property should not be twice burdened for the same tax; and consequently in construing general powers, bestowed on towns and cities to impose taxes, a construction ought not to be given, which should subject the property of a cor

poration to be twice taxed." This language was used in considering an enactment, the effect of which, if enforced, would have been to tax both the corporate property of the bank and the shares in the hands of the shareholders.

So also in its taxation of banks, owing to certain well known requirements of the National Bank Act, the State, in order to get a tax from said banks, must tax its own banks through the shares. Having done this, it leaves the banks otherwise untouched. Sec. 12 of Tax Act of 1900, Acts of 1900, pages 33-34. In this course the State departs from its general rule, which is to tax the *property* of corporations and to leave the *shares* untouched; but the departure emphasizes the policy of the State not to tax both.

See also Rome R. R. vs. Rome, 14 Ga., 275.

So also the State, dealing with the shares of domestic corporations generally, by question or otherwise only demands the return of shares for taxation, when *the corporate property itself does not pay taxes.*

See 33rd question, Tax Act of 1898, page 36.

The same view is taken by Courts in other jurisdictions.

MASSACHUSETTS.

In Tremont Bank vs. Boston 1 Cushing 142, the Court, while sustaining the tax as valid by the express language of the Statute, declares that a tax on the real estate of a bank in addition to a tax on shares, whose value is made up in part by the real estate, is double taxation. The Court says on page 145: "It may be truly urged, that such a tax upon a bank effects a double taxation upon the capital stock, to the extent that it is invested in real estate; such capital being liable, at the same time, to an assessment as personal property, in the form of a tax upon the shareholders."

In Middlesex R. R. Co. vs. Charlestown, 8 Allen 330, where there was no express provision for double taxation, it was held that a tax by the City of Charlestown on the railroad company's property could not be sustained, for the reason that the value of the property thus taxed was included in the value of the shares, which were already taxed. The Court says, on page 333: "We think it very clear that the plaintiffs were not taxable for any personal property in the city of Charlestown. They are a corporation established by law for the purpose of constructing and working a horse railroad. The corporation has no residence. Its stockholders are liable to taxation upon their shares in the towns where they dwell. The value of the personal property owned by the corporation is included as a subject of taxation in the value of the shares; as in the case of banks, insurance companies, manufacturing corporations, and other railroads."

NEW JERSEY.

In the case of The Belvidere Bank vs. Tunis, Collector, 23 New Jersey Law, 496, the tax act exempted from taxation "so much of the property of incorporated companies, represented by the capital stock thereof, as by virture of this act is taxed in the hands of the stockholders." The Court says, page 247. "It is perfectly clear that the capital stock in the hands of the stockholders repre-

sents the entire property of every incorporated company. All the property of the company goes to constitute the value of the stock, and upon the dissolution of the corporation, it all goes to the stockholders, in proportion to their respective shares."

MARYLAND.

In the Tax cases, 12 Gill and Johnston, 117, the Tax Act of 1841 made very sweeping provision for taxing all property. An assessment was made upon the capital stock of the bank and also upon its real estate, including its banking house, furniture and fixtures, and various other houses and lots, which the bank held as proprietor. The assessments upon the bank were set aside, the Court holding "that the property of a bank, being represented by the shares therein, both cannot be taxed; and therefore, when the tax is imposed on the the shares in the hands of shareholders, the property of the bank, real or personal, cannot also be taxed."

Cases on this line could be multiplied quite indefinitely.

Taken at their fullest value, what is established by the views thus far contended for? Only this: that the taxation of corporate property and of the shares, into which it is divided, is in effect, actually and substantially double taxation; that in such cases the one only real taxpayer, the real and substantial owner of the property, the shareholder, pays two taxes on one value; and that Georgia distinctly recognines that fact.

But "we make out no conclusive case against a tax, when we show that it reaches twice the same property for the same purpose."

Cooley on Taxation, 223-4.

No tax is made illegal by showing that it is in effect double taxation.

But while no "conclusive" case is made against the tax by showing that it is in effect double taxation, progress is made in the direction of the proposition, that in fact no tax has been imposed in this instance. For "it has very properly and justly been held that a construction of tax laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication. It is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party directly or indirectly."

Cooley on Taxation, 227.

"In the absence of constitutional restriction, double taxation is within the power of the State. Some constitutions, however, prohibit it. Whether double taxation is prohibited or not, if the language of the Statute imposing the tax is indefinite, the Courts will construe it in such a manner as to avoid that result—a construction which will subject property to double taxation not being permissible, unless required by the express words of the Statute or by necessary implication."

Such being the requirement of the law before double taxation can be imposed, I ask where is there any express enactment imposing a tax on these shares? The tax Act of 1898, under which this tax is claimed, has but one section, to-wit the first, which could have any bearing on these shares. It provides that the Governor, with the assistance of the Comptroller General, shall levy a tax "on all of the taxable property in this State." But it is conceded that this provision of the Act, or indeed any other enactment, does not reach shares of stock, where the corporation is itself taxed on its property. It is admitted that no shares, except bank shares—the bank's property not being taxed—are reached by this Act. Neither does the sweeping declaration of the Constitution reach these other shares for the practical purpose of levying a tax on them. For it is admitted of record, that the shares of domestic corporations are not taxed. This admission is not accompanied by any statement of the plaintiff in this case, the exceedingly vigilant and diligent Comptroller General, that the non-taxation of these shares is an oversight, an improper omission of duty. On the contrary it appears from the record that such non-taxation is the settled practice, and the practical construction of the tax law—constitutional and statutory—of the State. Indeed, Mr. Attorney General Wright, in his argument in the Circuit Court, declared that the taxation of these domestic shares would be "monstrous."

Whether it would be "monstrous" or not, as a matter of fact they are not taxed.

And yet there is quite as much law to tax them as there is for the taxation of the shares involved in this litigation.

The argument for the taxation of these shares is stated thus: The Constitution requires all the property in the State, except expressly exempted property, to be taxed. The mandate of the first section of the Tax Act of 1898 "to levy and assess * * * * * a tax * * * * * on all of the taxable property in this State" is sufficient "machinery" to bring in all property in this State. These shares are property in this State. *Ergo* there is law sufficient to tax them.

That is a simple argument and works very well for this particular case, if it embraces all the law of it. But why is it that it does not take in the shares of other corporations? There is no proposition of this simple argument that is not applicable to *them* also. They are property, they are personal property and they are attached to the persons of intra-territorial citizens. But it is notorious, and also in evidence in this case, that *they* are not taxed.

The explanation is that neither the constitution nor any other law of the State calls for *double* taxation. On the contrary the law of the land is that an express enactment is needed for double taxation, and here there is no such enactment.

Counsel for the Comptroller General recognize the necessity of differentiating the *status* of these shares from the *status* of those shares, which are admittedly not taxed by the laws of Georgia. They recognize the fact that this necessity extends to finding some law, applicable to the shares involved in this case and not applicable to the non-taxed shares. They claim to find it in the 30th of the questions propounded under the Tax Act. See Acts of 1898, page 30.

Said question is as follows: "How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?"

The position of counsel for the Comptroller General on this point in the case, stated somewhat after the manner of an algebraic problem, is this: The Constitution of the State and Tax Act of 1898, make up the law applicable to shares in domestic corporations, whose corporate property is taxed. The Constitution of the State and the Tax Act of 1898, plus question 30 of the Act of 1898, make up the law applicable to shares in foreign corporations, whose corporate property is taxed. Now eliminate the factors common to both propositions, for they cancel each other, and you leave the tax demanded in this case to rest on question 30 alone.

In view of the requirement that there must be express law, when it is sought to impose double taxation, is it conceivable that this substantial double taxation can rest on a mere question?

It is admitted by counsel for appellees that the purpose of these questions is to disclose the existence of taxable property; but it certainly will not be contended that a question *proprio vigore* can impose a tax on the person, of whom the question is asked. If question 30 has this force, so should any other one of the series. An examination of them will show that the potentiality claimed for them cannot exist. Question 2, for instance is: "The kind and value of property owned by the wife and minor children of the tax payer and not returned by the owner thereof?" This certainly does not levy a tax on the tax paying head of the family as to the things inquired about.

Again in question 15, the tax payer is called on to answer what *insolvent* notes he holds. It will certainly not be contended that this question imposes a tax on him for his insolvent notes. They may be property, but they have no value and have never been taxed in Georgia. The same is true as to question 15, which inquires as to *insolvent* accounts.

Again question 41, which is "give the names of defendants and the dates and amounts of the *fi fas* and the dates of your transfers," simply asks for information, the greater part of which has no bearing on the tax to be levied. Again, if the propounding of questions is to have the force which is claimed, then the legislature has abdicated in favor of the Comptroller General its sovereign power of taxation. For in Section 21 of the Tax Act of 1900, it has given him the fullest liberty of adding to or taking from the list of questions.

Acts of 1900, page 38.

The perversion of questions from their primary function of eliciting information as a basis for further action, and the erection of them into the force of express enactments imposing double taxation, is what the learned Attorney General has declared double taxation itself to be—simply "monstrous."

UNIFORMITY.

The proposed tax is a glaring departure from the rule of uniformity and equal fair dealing toward the citizens of the State, which the letter and spirit

of its tax laws enjoin. The owner of shares of the Western Railway of Alabama is no more an owner of his shares than the owner of Atlanta & West Point Railroad shares is the owner of his. The shares of the Alabama Railroad are, even in the view of the Comptroller General, no more "in the State" of Georgia, when held by a citizen of Georgia, than are the shares of the Atlanta & West Point Railroad when held by a citizen of Georgia. The holder of the Atlanta & West Point shares pays no taxes. Why? Because the property which his shares represent, is taxed. The property of the Alabama Railroad is also taxed. Up to this point, the parallel between the two citizens of Georgia is complete; but here the lines diverge. Assuming that the tax paid by the Atlanta & West Point corporation is one per cent. and by the Western Railway of Alabama corporation the same, the citizen of Georgia shareholder in each suffers a dimunition of one per cent. from his dividend on that account. But that is the end of the loss to the Georgia citizen, holder of Atlanta & West Point stock; but the loss of his next door neighbor, Western of Alabama shareholder, must, as contended by the Comptroller General, be increased by the tax on the shares.

Now the uniformity and equality provisions of tax systems are the *citizen's* side of the problem. The Government's concern for itself is to raise a sufficient revenue: its concern for its *citizens* is to make the burden as far as practicable equal and uniform on each. It is for *its citizens* that it devises measures of uniformity and equality. The fact that its citizen is interested in industrial enterprises beyond its borders, furnishes no justification for treating *him* differently from any other citizen holding identically the same kind of property. Indeed its purpose to tax the shareholder of The Western Railway of Alabama looks as if the State of Georgia, in its greed for money, would seize its own defenseless citizen and by squeezing him collect taxes on property in another State. There is not a single difference between the holders of Atlanta & West Point shares and holders of the shares involved in this case but a State line. What sympathy will such a policy receive in a national court?

"Theoretically tax laws should be framed with a view to apportioning the burdens of government so that each *person* (J. B. C.) enjoying government protection shall be required to contribute so much as is *his* (J. B. C.) reasonable proportion, and no more. The tax law that comes nearest to accomplishing this is, in theory, the most perfect."

Cooley on Taxation, 164.

"Equality and justice are constantly to be aimed at."

Cooley on Taxation, 222.

II.

Up to this point we have considered those principles of construction of tax laws from which, when applied to the facts of this case, the deduction may be drawn that the State of Georgia has not in fact levied a tax on these shares. We now proceed to point out some direct and positive reasons against such taxation—and first as to

SITUS.

"It would seem to be an axiom that a State has no right to impose taxes upon persons or property beyond the limits of the State; its sovereignty extends no farther."

Burroughs on Taxation, Sec. 40.

"The true principle on which to declare whether personal property is liable to be taxed is the *situs* of the property."

Desty on Taxation page 60.

"As to real estate it has never been claimed that such property could be taxed by any State other than that in which it is situated. And the same rule seems to be applicable to personal property; but the difficulties arise in the application of the principle."

Burroughs on Taxation, Sec. 40.

This author in the last paragraph of the same section, after stating the general rule to be that chattels are taxed at their actual *situs*, without reference to the residence of their owner, says that there is some comflict of authority in reference (among other things) to stocks of corporations.

Burroughs on Taxation, Sec. 40.

"The power of taxation by any State is limited to persons, property or business within its jurisdiction."

Tappan vs. National Bank, 19 Wall, 490-499.

Authorities might be multiplied indefinitely to show the territorial limitations of the taxing power. The Constitution of Georgia provides for a property tax only on the property within "the territorial limit of the authority imposing the tax." The Tax Act of 1898, under which these taxes are sought, levies a tax only on the taxable property "in this State." Indeed the proposition is axiomatic.

The most obvious subject of taxation by Georgia laws is the real estate situate, lying and being in the State of Georgia. Another obvious subject of taxation by those laws is personal property, having a physical *situs* within the territory of the State, such as animals, vehicles, etc.

Not so obviously, but still unquestionably, *choses in action*, belonging to residents of Georgia, are subjects of taxation by those laws. They (choses in action) are incapable of physical *situs*. They are intangible, and the law not having the guide or test of actual physical situs, has long since settled arbitrarily that they attach to the person of the owner and are in comtemplation of law where the owner is.

Other personal property may have its situs in a jurisdiction other than that in which the owner of the property resides. It is then taxable in such other jurisdiction. This rule applies clearly to tangible personal property such as animals, vehicles and the like, capable of having an actual physical situs.

A vital inquiry in this case is to ascertain in what class or category are shares of stock of an incorporated company. Where is their *situs*? Is it with their owner or is it where the corporate property itself is?

Nowhere, I assert with some confidence, are shares deliberately designated *choses in action*. Instances may be found where Courts, dealing with the status of other property and not of shares of stock, have used in a general enumeration the phrase *choses* in action as applicable to bonds, promissory notes, open accounts, other evidences of indebtedness and shares of stock. In places also Courts have spoken of shares of stock as being in the "*nature* of *choses* in action." But it is doubted whether any Court has deliberately and on consideration so entitled them. Neither would it seem accurate to say that shares of stock are "intangible." The certificate, which is held by the owner as evidence of his ownership is in itself not intangible any more than is a deed evidencing the title of an owner to real estate. The property, of which the certificate is the evidence, is certainly not intangible—and herein is a marked difference betwen "mere choses in action" and shares, and the analogy between certificates and deeds is very close. Shares of stock seem to be different in some respects from any of the subjects of taxation above mentioned. They are in this respect *sui generis*. According to authority and established principles of law their *situs* can be fixed arbitrarily. Where this has not been done, where, as in the State of Georgia, there is no enactment direct or indirect on the subject, a Court, in seeking to ascertain the *situs*, should do so in such a way as to avoid injustice and oppression, which double taxation is virtually admitted to be, though it may be legal. The natural equities and the presumption against double taxation should incline the Court to let even slight legal reasons turn the scale in favor of the taxpayer.

No *enactment of the Legislature* of Georgia has ever fixed in Georgia the *situs* of shares of stock held by citizens of Georgia in foreign corporations.

The *Courts* of Georgia, so far as they have spoken at all on this subject, have indicated that the *situs* of such shares is in the jurisdiction where the corporate property is located.

In the case of Dearing vs. The Bank of Charleston, 5 Ga., 497, the property in dispute was certain shares of the stock of The Augusta Insurance & Banking Company, a corporation under the laws of Georgia having its principal office in Augusta. These shares had belonged to Peck, who to secure a debt owing by him to the Bank of Charleston, South Carolina, had transferred them to that Bank, which thus held the legal title. In a contention over these shares between the Bank and Dearing, a Georgia judgment creditor, the Court held, norwithstanding the legal title—equivalent to ownership—of the Bank of Charleston, that the *situs* of these shares was in the State of Georgia. See bottom of page 515."

The case of Wright, Comptroller General vs. the Southwestern R. R. Company, 64 Ga., 784, will be greatly relied on in this argument for establishing the proposition that the non-taxability of the shares in question is not an open question in Georgia, but for the present the case is cited as affecting the question of the *situs* of the stock. In effect and by the strongest implication it fixes the *situs* of such shares at the corporation's domicil. It does so when it uses the following language (see page 799.)

"Stock held by the Company in railroads without the limits of the State is not taxable here. Stock in a railroad is really but so many shares of its

property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

This case is further commented on at this point as furnishing a reply to the position taken by Counsel for the Comptroller General, to the effect that the case of Dunbar vs. Augusta, 50 Ga., 392 fixed the *situs* of shares of stock at the domicil of their owner.

The case just quoted from in 64 Ga., after the quotation above named, proceeds to draw the distinction between "bonds, notes and all other mere evidences of debt" on the one hand, and shares of stock on the other. After having just declared that shares of stock in a foreign corporation are not taxable in Georgia, the Court goes on to say that bonds, notes and all other mere evidences of debt "follow the *situs* of the creditor no matter where the debtor lives." For sustaining this proposition the Court cites Dunbar vs. Augusta, *supra*———thus limiting, in the most unmistakable way, the application of that case to "bonds, notes and all other mere evidences of debt." Indeed even a casual examination of the Dunbar-Augusta case will show that anything said in it about *stocks* is clearly *obiter*. The sole question involved in the case was liability or non-liability to taxation of certain *bonds*, held by Dunbar.

It has been said above that there is no legislative enactment in Georgia fixing the situs of shares of stock in an incorporated company. This, however, is not strictly true. The tax act of 1898, under which this tax is demanded, and previous tax acts for many years, fix the *situs* of shares of National Banks at the domicil of the Bank, although the shareholders themselves may be residents of other states.

In Tappan vs. Merchants' National Bank, 19 Wallace 490, the Court says on page 499:

"The power of taxation by any State is limited to persons, property or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicil. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located."

Again, speaking of the nature of National Bank shares, the Court says:

"Shares of stock in National banks are personal property. They are made so in express terms by the Act of Congress under which such banks are organized. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own."

It will be observed that in this case the Court says in effect, in the language first above quoted, that a "law"—not necessarily a statute—can separate such property from the person of the owner and give it a *situs* elsewhere. We claim that there is such "law" in Georgia, and that it is found in the rule of property laid down in 64 Ga. above cited.

In the case of Jellenik vs. Huron Copper Mining Company 177, U. S. 1, the Court decides clearly and unreservedly that shares in a Michigan corporation owned by a citizen and resident of Massachusetts have their *situs* in the State of Michigan.

It is true that this holding of the Court was made on a question of jurisdiction and not of taxation. It is also true that the Court says:

"Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it."

I would remark in passing that the very fact that the Court feels called upon to say that the effect of the ruling on taxation is a question reserved, is very suggestive and significant of the idea that that question would inevitably arise in that connection.

Indeed the reasons given by the Court for fixing the *situs* of the shares for the purpose of jurisdiction are equally strong for fixing the taxing *situs*. After declaring that the shares are personal property, it uses this language:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicil of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is the real owner."

Observe that this is substantially the language used by the Supreme Court of Georgia in the Southwestern Railroad case, when it laid down the rule of property as affecting taxation of shares.

It is well known to all, lawyers and laymen, who have dealings involving the transfer of shares of stock, that the corporation issuing the shares, in a very practical and substantial sense, holds them as trustee for the owners of the stock and their creditors. The corporation, as is well known, is responsible to both those classes that no improper transfer shall be made. The corporation passes upon the right of a person, occupying a representative relation to the shares—such as administrator—to transfer them. The process, by which in Georgia and elsewhere, the creditor of the shareholder seizes the shares, is served upon the corporation. All this implies possession of the shares by the corporation—that is to say, *situs* of the shares with the corporation.

The question of the taxability or non-taxability of such shares not an open question in Georgia.

In the case of Wright, Comptroller General vs. The Southwestern Railroad Company, supra, the Court on page 799 uses this language: "(a) Stock in the company's own road, held by itself, or in other roads in this State, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; *and stock held by the company in railroads without the limits of this State is not taxable here. Stock in a railroad is really only so many shares of its property and that property is real estate, for the most part at least, and taxable by the State in which the road is located.*"

But this deliverance by the Supreme Court of Georgia is attacked by the counsel for the Comptroller General on two grounds:

First. It is claimed that it was "a dictum of Judge Jackson," "was clearly not well considered at the time" and "was rendered on the preliminary injunction."

To this I reply: If counsel mean to imply that the question, passed upon by a unanimous Court through their mouthpiece Judge Jackson, was not directly involved in the case, and that this deliverance was a "dictum" in the sense of being *obiter dictum*, counsel is manifestly in error. It appears from the report of that case that the Comptroller General was seeking to levy a tax on *all* the prop-

erty of the railroad. This effort led to an injunction and to the marshalling of all the property of the railroad company and the submission to the Court of the question of the taxability of each kind of property. The Court says, on page 794: "The numerous questions made as to different parts of the road and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and other questions in respect to *other items of property in and out of the State* (J. B. C.), and in what degree and how connected with the road, *and whether liable or not to be taxed*, (J. B. C.), make the case complicated," etc.

Also the novel attack is made on this unanimous judgment of the Supreme Court of Georgia that it was rendered on an interlocutory injunction. The learned and experienced counsel of the Comptroller General will, on reflection, doubtless admit that the *law*, where there is no dispute as to the facts, is invariably settled in injunction cases on what they are pleased to speak of as a "preliminary injunction."

In the case under discussion the Court says on page 796: "We think that on the hearing complete relief should be afforded, and the whole matter be investigated *to ascertain precisely what property of the Company should be taxed and what should not be taxed* (J. B. C.) * * * and in order to facilitate the trial, or a settlement, if desired, before trial, *we will indicate our opinion in regard to these matters now.* (J. B. C.)

It is true that the Court says on page 801, "The views given above are merely indicative of what we now think, from our understanding of *this record as it now appears*" (J. B. C.) But the Court also says in conclusion, page 801: "It is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and *the law as indicated above be applied to those facts* (J. B. C.) subject to be modified by the chancellor as *facts other than those in this record* (J. B. C.) may require."

It is not possible to conceive of authority more direct and unimpeachable for the proposition announced by the Court viz.: "*Stock held by the Company in railroads without the limits of this State is not taxable here.*"

There was but one conceivable way to break down this authority and that is not available to opposing counsel, for it does not in fact exist, viz: to show that the case went again to the Supreme Court, that on said second hearing that Court recalled its previous rulings, and that the Comptroller General has in fact taxed the shares which the Court in this "preliminary injunction" declared to be non-taxable. I respectfully, but confidently, challenge counsel to show all or any of these facts.

But it is said by counsel for the Comptroller General that the case of Wright, Comptroller General vs. Southwestern Railroad Company is no longer authority, for the reason that it was a case originating prior to the Georgia Constitution of 1877.

That case, as above stated, arose out of the effort of the Comptroller General to tax all the property of the Railroad Company. This effort was made under the Act entitled "An Act to Amend the Tax Laws of this State so far as the same relate to Railroad Companies, and to define the liability of such companies to tax, and repeal so much of the charters of each company respectively as may

conflict with the provisions of this Act, approved February, 1874." The first section of said Act is as follows:

"From and after the passage of this Act the Presidents of all the Railroad Companies in this State shall be required to return on oath annually to the Comptroller General the value of the property of their respective companies, without deducting their indebtedness, each class or species of property to be separately named and valued so far as the same may be practicable, to be taxed as other property of the people of the State."

This has been the law of Georgia ever since said Act was passed and is now to be found in Section 780 of the Code of 1895. So far as the subject of railroad taxation is concerned the Constitution of 1877 did not advance an inch beyond the Railroad Tax Act of 1874 just cited. The Constitution requires all the property of railroad companies in the State of Georgia to be taxed: the Act of 1874 makes the same requirement as thoroughly and unreservedly. There is no provision of law in Georgia now, constitutional or statutory, declaring what property of railroads should be taxed, which did not exist prior to the Constitution of 1877, and has not existed ever since the passage of the Act of 1874. The Constitution added nothing to the stringency and thoroughness of this Act. Then as now the presidents of railroad companies were required to return on oath to the Comptroller General the value of the property of their respective companies, each class to be separately named and valued, to be taxed as other property of the people of the State.

See Tax Acts of 1874-5-6.
Code of 1882, Sec. 826 a.
Code of 1895, Sec. 780.

Then as now the law of Georgia regarded shares, representing stock in incorporated companies holding lands or a franchise in or over lands, as personalty.

Code of 1873, Sec. 2211.
Code of 1882, Sec. 2237.
Code of 1895, Sec. 780.

Again, it is urged by Counsel for the Comptroller General that the case of Wright, Comptroller General vs. the Southwestern Railroad Company, *supra*, was decided at a time when the Legislature of Georgia under its then Constitution could have exempted any property it saw fit to exempt from taxation: but that the Constitution of 1877 has taken away that right from the Legislature.

This might be a pertinent argument against the decision, if the decision were cited in support of a claim of exemption from taxation, but such is not the case. The decision is cited, not as declaring or attempting to declare any property in Georgia exempt from taxation, but as laying down a rule of property, and declaring what is the *situs* of certain property, and as holding also, incidentally, that the taxation of corporate property and also the shares representing the corporate property is double taxation.

The case of Atlanta Building and Loan Association vs. Stewart Tax Collector, 109 Ga., 80; seems to be considered by Counsel for the Comptroller General as furnishing some support to their contention. Why, is not very apparent. The

decision announced propositions, not contested by Counsel for the railroad company, as to the liability of all property *in* the State of Georgia to taxation and as to the impotence of the Legislature to exempt such property from being taxed one time. But as to one of the controlling questions, viz.: *situs*, it is silent and not at all in conflict with previous Georgia authorities; while on another controlling question, that of the taxation both of corporate property and the shares, into which it is divided, its deliverance, so far as it makes any, is in favor of the contention of these appellees, when it says: "Possibly it may be competent to provide against taxing the shares of stock, where all the property which gives them value, has been taxed." But the Court then proceeds to declare that the decision is not to be taken as authority for or against that proposition. Indeed this decision has no bearing on the case at bar. It is properly disposed of by the learned judge of the Circuit Court, from whose judgment this appeal is taken. After quoting the first two head notes of the decision, Judge Newman says:

"What is thus stated in the head notes, and more elaborately in the opinion, is beside the exact question involved here, which is, whether the State, for purposes of taxation, treats the shares in a railroad corporation as property distinct and separate from that of the corporation which it represents. Unquestionably the effect of the decision of the Supreme Court of the State in Wright, Comptroller General vs. Southwestern Railroad Company, *supra*, is that the State does not so regard shares of stock in railroad corporations located without the State."

Again, "there is nothing whatever in this decision to the effect that the State treats shares of stock in corporations as separate and distinct from that of the corporation for purposes of taxation, when the corporation itself is taxed on the property which the shares represent."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 234.

WILLIAM A. WRIGHT, Comptroller-General, Petitioner, *vs.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND ATLANTIC COAST LINE RAILROAD COMPANY, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF KING & SPALDING FOR APPELLEES.

STATEMENT OF THE CASE.

This cause originates in a bill in equity filed by the railroad companies, respondents, against William A. Wright, the petitioner in certiorari, and the Georgia Railroad and Banking Company, a corporation created under the laws of Georgia, to enjoin the enforcement by said Wright, Comptroller-General of Georgia, and the payment by the Georgia Railroad and Banking Company, of an amount claimed as taxes, alleged to be due for the year 1900, on fifteen thousand (15,000) shares of capital stock of the Western Railway of Alabama, a corporation created under the laws of the State of Alabama. (Transcript, pp. 1–7.)

The case was tried upon the bill, the answer of the defendant, Wright, and an agreed statements of facts—the answer adopting said agreed statement of facts, and setting up that the bill made no case entitling plaintiff to relief; that there was no

equity in the bill; that complainants had a complete remedy at law. (Transcript, p. 10.)

The case made by such pleadings and statement was as follows:

The Western Railway of Alabama is a corporation chartered under the general laws of the State of Alabama, owning and operating a railroad extending from Selma via Montgomery to West Point, in the State of Georgia. All of said road, except a quarter of a mile, lies in the State of Alabama. This quarter (1-4) of a mile lies within the State of Georgia, and was constructed under an Act of the General Assembly of Georgia, passed in the year 1837, authorizing the predecessor of said Western Railway of Alabama to build and operate said road in the State of Georgia; said Act being a public act, and being found in the published Acts of 1837, pages 201, 202. (Transcript, p. 11.)

This property, after some prior changes of ownership, was sold in 1875 under a mortgage foreclosure, and was purchased jointly by the Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia, two railroad corporations of the State of Georgia; such purchase being made by authority of a public act of the General Assembly of Georgia, authorizing said companies to make such purchase. See Acts of Georgia of 1875, pages 235, 236. (Transcript, p. 11.)

Said two last-named corporations held said railroad as tenants in common, and operated the same without further incorporating it, until a time subsequent to the 7th day of May, 1881. (Transcript, p. 11.)

On the 7th day of May, 1881, the Georgia Railroad and Banking Company entered into an indenture of lease with one William M. Wadley, whereby it leased to the said Wadley, or assigns, for the term of ninety-nine (99) years from the 1st day of April, 1881, all of its rights of transportation

and its railroads, describing the same therein, and also "all "the rights of ownership, management, control and use of the "Western Railroad of Alabama, which the (said Georgia Rail-"road and Banking Co.) now has, or is entitled to," &c. (Transcript, pp. 10, 20, 21.)

By said lease it was further provided that the said Georgia Railroad and Banking Company "will consent to the organi-"zation of the owners of the Western Railroad of Alabama "into a corporation; * * * * *provided*, the said incorporation "shall not impair the beneficial ownership of said railroad by "the (Georgia Railroad and Banking Co.)" (Transcript, p. 23.)

Subsequently, in 188—, in accordance with the stipulations of said lease, a charter was applied for, and a certificate of incorporation issued by the Secretary of State for the State of Alabama, conformably to its general law, incorporating the Western Railway of Alabama. To that corporation the Georgia Railroad and Banking Company, and the Central Railroad and Banking Company, conveyed the said Western Railroad of Alabama, extending from Selma, Ala., via Montgomery, to a connection with the Atlanta and West Point Railroad, in the city of West Point, Georgia, receiving from said new corporation thirty thousand (30,000) shares of its capital stock of one hundred ($100.00) dollars each, aggregating three million ($3,000,000) dollars; each of said corporations so conveying said railroad receiving fifteen thousand (15,000) of said shares. Said Western Railway of Alabama owns no property in the State of Georgia, except the small portion of railroad hereinbefore set out, located in the county of Troup, State of Georgia. (Transcript, pp. 11, 12.)

Said 15,000 shares of stock "were issued to and stand in "the name of the Georgia Railroad and Banking Company, "but an irrevocable power of attorney or proxy to vote the "same has at all times been issued and existed under said

"lease in favor of the lessees or assigns, or such person as "they might designate to vote said shares." (Transcript, p. 12.)

It was further agreed that, by different assignments of the lease, the Louisville and Nashville Railroad Company became the sole assign of said lease, and became the lessee of said leased property and interests described therein, in lieu of the said Wadley, and was accepted by the Georgia Railroad and Banking Company as such sole lessee, and after being so accepted, deposited one million ($1,000,000) dollars of securities acceptable to the Georgia Railroad and Banking Company, to secure the faithful performance of said lease according to the covenant made in said lease in respect to making such deposit. (Transcript, p. 10.)

For the covenant of said lease so requiring, see (Transcript, pp. 24, 25.)

Subsequently, the Atlantic Coast Line Railroad Company acquired a half interest in said lease from said Louisville and Nashville Railroad Company, and was accepted by said Georgia Railroad and Banking Company as a co-lessee with said Louisville and Nashville Railroad Company, and the appellees are now co-lessees of said lease, and hold the same as fully and to all intents and purposes as did the said William M. Wadley. (Transcript, pp. 10, 11.)

Neither the Georgia Railroad and Banking Company nor its lessees have at any time paid any taxes on the shares of stock of the Western Railway of Alabama, issued as aforesaid. (Transcript, p. 12.)

The Western Railway of Alabama has paid to the State of Alabama all State and county taxes which have been demanded of it by said State. (Transcript, p. 13.)

About the 25th day of May, 1901, the appellant specifically demanded of the Georgia Railroad and Banking Company that it pay taxes on said shares of stock for the year 1900, to the State of Georgia; which said sum so demanded amounts to between $7,000 and $8,000. (Transcript, p. 12.)

The blanks sent annually by the Comptroller-General to the Georgia Railroad and Banking Company to use in making tax returns contain, among others, the following questions, to wit: "Number stocks and bonds owned by the company, and value "of all property not enumerated, and value of tools."

In no other way than in furnishing these blanks did the Comptroller-General make demand for taxes upon said shares of stock, until about the 25th day of May, 1901, when he made the demand last above mentioned. (Transcript, pp. 13, 30.)

Under the Statutes of Georgia regulating railroad taxation, all taxes payable by railroads, whether State, county or municipal, are required to be assessed by the Comptroller-General of the State.

Code of Ga., vol. 1, *secs.* 780, 784, 785.
Railway Co. vs. *Wright,* 151 *U. S.* 471.

It further appears, "that whatever taxes are collectable "from said stock during the entire term of said lease are pay- "able by the lessees thereunder, or if the same are lawfully "collected from said Georgia Railroad and Banking Company "said lessees are liable to reimburse the same to said Georgia "Railroad and Banking Company, without in any way dimin- "ishing the rental which is payable by said lessees under said "lease." (Transcript, p. 12.)

It was also agreed "that stockholders in the Atlanta and

"West Point Railroad Company, the Georgia Railroad and "Banking Company, the Augusta and Savannah Railroad "Company, and of all corporations which pay taxes upon their "property do not return their shares of stock for taxation." (Transcript, p. 12.)

The bill averred that the railroad companies, complainants therein, the present respondents, were without legal remedy to resist the payment of said alleged taxes if so coerced, and would be without remedy unless granted relief in the present proceeding. That under the laws of Georgia such shares of stock were not liable to taxation, and that the petitioner, Wright, was proceeding without law, or color of law, in attempting to collect the same. That such attempted collection and the enforcement of such pretended taxes would take their property without due process of law, and deny to appellees the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States. That there was no law in the State of Georgia authorizing the taxation of railroad shares of stock in the hands of the owners thereof. That under such law shares of railroad stock are mere representations of the railroad property itself, and such property must be taxed where located in Georgia, and, where not so located, is not subject to be taxed by the State of Georgia.

That the taxation of said shares would be taxation by the State of Georgia of property located in the State of Alabama.

That the State of Georgia does not tax under its law shares issued by railroad corporations of the State, but recognizes the same as mere certificates of interest in the railroad property, which is itself taxed, and that there is no law of the State creating any other or different rule for railroad shares issued upon properties lying without the State. (Transcript, pp. 4, 5, 6.)

The bill prayed that the shares of stock be decreed to be not subject to taxation; that the Georgia Railroad and Banking Company be enjoined from returning the same for taxation or paying taxes thereon; that William A. Wright be enjoined from issuing any execution or taking any steps to collect said taxes, and be decreed to be without warrant or authority of law so to do. The prayer was also for general relief. (Transcript, p. 6.)

On the hearing the Court held that under the law of Georgia shares were but representations of the railroad property, and that foreign railroad shares were not subject to be taxed, and enjoined the defendants as prayed. (Transcript, pp. 10, 13, 17, 18.)

The said W. A. Wright, Comptroller-General, thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit, filing the following:

ASSIGNMENT OF ERRORS.

That the Circuit Court erred in:

1st. Overruling the grounds of demurrer in the answer:
   (*a*) That there was no equity in the bill, nor case made for equitable relief.
   (*b*) That complainants were without sufficient interest to sue.

2d. Holding that the stock was not taxable in this State.

3d. Holding said shares a mere representative of the railroad property itself, and not taxable.

4th. Enjoining the appellant from undertaking to collect said alleged tax.

5th. Enjoining the Georgia Railroad and Banking Company from paying any tax on said stock. (Transcript, pp. 27, 28.)

After argument had in said Court of Appeals, the decree of the Circuit Court was affirmed. (Transcript, p. 31.)

Upon the petition of said W. A. Wright, Comptroller-General, the writ of certiorari was granted, issued to said Circuit Court of Appeals, and the record of said case sent up to this Court. (Transcript, p. 34.)

BRIEF OF ARGUMENT.

I.

Where a right is created by the State law in favor of its own citizens, the Federal Courts can enforce the same by appropriate remedies, at the instance of a citizen of another State.

"1. Whenever a citizen of a State can go into the courts "of a State to defend his property against the illegal acts of "its officers, a citizen of another State may invoke the juris- "diction of the Federal Courts to maintain a like defense. "A State can not tie up a citizen of another State having "property rights within its territory invaded by unauthorized "acts of its own officers, to suits for redress in its own courts. "Given a case where a suit can be maintained in the courts "of the State to protect property rights, a citizen of another "State may invoke the jurisdiction of the Federal Courts. "*Cowles* vs. *Mercer County*, 7 *Wall*, 118; *Lincoln County* vs. "*Lunning*, 133 *U. S.* 529; *Chicot County* vs. *Sherwood*, 148 *U.* "*S.* 529."

Reagan vs. *Farmers Loan & Trust Co.*, 154 *U. S.* 362, 392.

2. Under the practice and procedure in Georgia injunction is a proper remedy to prevent the assessment, or collection, of an illegal tax.

Where land is levied upon by the tax-collector of one county as being located therein, when the true boundary of the county shows it lies in the second county, "the tax-collector of the "other county may be restrained by injunction from collect- "ing the taxes which would be due to it were the tract in that "county, but which are not due because of its being in the "adjoining county."

Smith, tax-callector, vs. *Dees*, 92 *Ga.* 549.

Where the provisions of a city charter requiring tax-assessors to assess all realty according to its market value on the first day of a certain month, and also requiring the return of all personalty owned by the taxpayer on the 15th of that month, are enforced so as to levy a tax on the vendor of land, both as to the realty sold and as to the proceeds of sale in cash or notes, such enforcement of the city charter should be restrained by injunction.

"Having applied to the assessors, who refused her applica-"tion, and having applied to the mayor and council, who "failed and neglected to act upon her petition, she had no "other recourse against this illegality than to seek an injunc-"tion from a Court of Equity."

Sheibley vs. *Rome*, 107 *Ga.* 384, 385–6.

An injunction is an appropriate remedy to restrain the Comptroller-General from proceeding prematurely with the issuance of a tax execution against a railroad company.

Wright, Comptroller-General, vs. *Railroad*, 85 *Ga.* 649, 650.

"Where any ministerial officer of this State is attempting "to collect money out of a person, natural or artificial, under "the forms of law, but without any valid law to authorize the "process he uses and calls an execution for taxes, it is the "duty of the courts, in a proper case made, to arrest the pro-"ceedings in some of the modes known to the law, and afford "relief to the party justly complaining.

"Equity has jurisdiction to interfere in behalf of any person, "natural or artificial, entitled to relief on the following "grounds: (1) Where exactions are pressed in the form of "annual taxes, inconsistent with, and violative of, legal rights. "(2) Because the exactions might be repeated and wrong "multiplied."

Southwestern Railroad vs. *Wright, Comptroller General*, 68 *Ga.* 311, 320.

Where a tax has been illegally imposed, and is illegally in process of collection by the tax-collector of a county, an injunction should be granted.

S. F. & W. Ry. vs. *Morton et al.*, 71 *Ga.* 24, 25.

Where there is no authority of law for the collection of a tax, an injunction is an appropriate remedy to prevent collection.

State vs. *S. F. & W. Ry.*, 111 *Ga.* 803.

It is therefore apparent that the settled remedy in Georgia, and in the courts of that State, to prevent the collection of an illegal tax, where the officer has no authority to levy or collect the same, is in equity and by injunction.

The statutory remedy provided for meeting the levy of a railroad tax execution issued by the Comptroller-General is one known as an affidavit of illegality.

Code of Ga. of 1895, *vol. I., secs.* 782, 789.

The affidavit of illegality is in its essence an equitable proceeding to restrain the progress of an execution, and its complement in the courts of the United States is a proceeding in equity to restrain.

"Illegalities are equitable proceedings, at least in the nature of equitable proceedings."

Higgs vs. *Huson*, 8 *Ga.* 319.

Where there is no adequate and complete remedy on the law side of the courts of the United States, a party may sue on the equity side, even when a complete remedy is furnished by the law of the State in the State Courts.

Nat. Bk. of N. O. vs. *Baker*, 4 *Woods*, 74.

II.

Where the remedy at law is not so complete, or where a cloud upon the title might be produced, the remedy is in equity.

"Courts of Equity undoubtedly have jurisdiction to hear

"complaints of those who assert that their lands are about to "be assessed and subjected to liens by a Board of Commission "acting in pursuance to the provisions of a statute which has "been enacted under the forms of law, but which is uncon- "stitutional, and therefore does not avail to confer the powers "sought to be exercised. *Dows* vs. *Chicago*, 11 *Wall*, 108; "*Union Pac. Railway* vs. *Cheyenne*, 113 *U. S.* 516; *Ogden City* "vs. *Armstrong*, 168 *U. S.* 224; *Dillon's Mun. Corporations, vol.* "2, *sec.* 833, *4th ed.*"

Wilson vs. *Lambert*, 168 *U. S.* 611, 612.

In the case last cited the board was proceeding without any law (because an unconstitutional statute is as though there was no statute). In this case, as we shall show hereafter, the Comptroller-General is undertaking to proceed without any law, as the statutes of Georgia do not embrace shares of stock in railroad corporations, either within or without the State.

Nevertheless, in this case if the Comptroller-General should make an assessment of these taxes and issue an execution upon the same against the Georgia Railroad and Banking Company, and levy upon some of its property in the State and sell it, the issuance of such an execution would *prima facie* constitute a general lien upon all of its property.

Says the statute: "On failure to pay the taxes so assessed, "the Comptroller-General shall proceed to enforce the collec- "tion of the same in the manner provided by law for the en- "forcement of taxes against the other incorporated companies "before mentioned."

Code of 1895, *vol. I., Sec.* 781.

"If any corporation, company * * * * * * where "required to make their returns to the Comptroller-General, "shall fail to return the taxable property or specifics, or pay "annually the taxes for which they are liable to the State "Treasurer, the Comptroller-General shall issue against them "an execution for the amount of taxes due, according to law, "together with the costs and penalties."

Code of 1895, *vol. I., sec.* 874.

"The property returned or held at the time of giving in, or "after, is alway subject (to the lien of taxes). A sale of "property under any other process does not divest the lien of "the State for taxes."

Code of 1895, *vol. I., secs.* 883, 884.

"The deed or bill of sale (made under the tax execution) "shall be just as valid to the purchaser as if made under the "ordinary process of law issuing from the Superior Court."

Code of 1895, *vol.* I, *sec.* 913.

This section applies to sales under tax executions issued by the Comptroller-General.

Bedgood vs. *McLean*, 89 *Ga.* 793.

Were the Comptroller-General, therefore, to assess these taxes, and levy an execution for the same, and property to be sold thereunder, the purchaser's deed, with the Comptroller-General's execution, would constitute a good *prima facie* title, and it would be necessary to go into parol to show how the alleged tax originated, and on what property, in order to impeach the apparent validity of the tax execution as a lien clouding all of the leasehold estate of the complainants, or in order to impeach any deed which might be made under such execution, as constituting a cloud upon the title to such property so sold. In such case the remedy at law is not complete, and equity has jurisdiction.

Dows vs. *Chicago*, 11 *Wall*, 198.
Hannewinkle vs. *Georgetown*, 15 *Wall*, 547.
Ogden City vs. *Armstrong*, 168 *U. S.* 224, 238.

Again, in this case the matter would be further complicated by the fact that the Comptroller-General is proceeding against the lessor company, while the lessees are the real parties at interest, under the agreed statement of facts.

"Where the remedy at law is plain, equity will not interfere "if the remedy is also adequate and complete; but, if the "remedy at law is doubtful, the Court of Equity will retain the 'case, and if the proofs are satisfactory, will grant relief."

"Jurisdiction to a partial extent may exist at law; but, if the "remedy there is not adequate—that is, if the party cannot "attain at law the full justice of the case—he may, if he sees "fit, pursue his remedy in equity. Nor is the Court of Equity "closed to the party unless the remedy at law is complete, "and will secure to the party the whole right involved in a "manner as just and perfect as would be attained in a suit in "equity. 1 *Story's Eq. sec.* 33; *Ins. Co.* vs. *Bailey*, 13 *Wall*, "621."

Clements vs. *Macheboeuf et al.*, 92 *U. S.* 418.

III.

The appellees are vitally interested in the question of whether these alleged taxes can be lawfully assessed. They are the payees of all such demands.

1. The agreed statement of fact shows their interest in the matter. (Transcript, pp. 11, 12, 14.)

Again, the bill avers, and the answer does not deny, that a levy or sale to collect same, would be of the leased property, and would destroy or impair their enjoyment thereof.

Under the Georgia Code the party entitled to the use of property, such as the life tenant, tenant for years, etc., is the primary taxpayer.

Code of 1895, *vol. I., sec.* 778.

Where one has an interest in the subject-matter he can maintain such litigation.

2. But in this case the Georgia Railroad and Banking Company has consented to an incorporation subject alone to such

incorporation, not impairing the beneficial ownership of said Western Railroad by such Georgia Railroad and Banking Company. (Lease, Transcript, p. 27.)

The lessees are vested with "all the rights of ownership, "management, control and use of the Western Railroad of "Alabama, which the party of the first part (Ga. R. R. & Bgk. "Co.) now has or is entitled to." (Lease, Transcript, p. 24.)

We insist that this constitutes the lessees the owners of this stock, subject alone to protecting the beneficial ownership of said lessor after the expiration of said lease.

IV.

All property in Georgia, which is not exempt under the provisions of the Constitution of the State, must be taxed equally with all other property.

The Constitution of Georgia prescribes:

"All taxation shall be uniform upon the same class of sub- "jects, and *ad valorem* on all property subject to be taxed "within the territorial limits of the authority levying the tax, "and shall be levied and collected under general laws."

Constitution of Ga. of 1877, *Art.* 7, *sec.* 2, *par.* 1; *Civil Code, sec.* 5883.

The Supreme Court of Georgia has construed this Constitutional provision as follows:

"* * * Under the system of taxation prescribed by our "Constitution the property of all persons and corporations, "unless exempted, is not only to be taxed, but must be taxed "on the basis of value. Under its provisions, property of "every kind, real estate, money, choses in action, movables "are, as a rule, not only subject to tax, but, taking values as "a basis, subject to the same rate of tax; * * * and property "of all kinds is, by a proper interpretation of our statute "placed in one class as a subject of taxation."

Georgia B. & L. Asso. vs. *Savannah,* 109 *Ga.* 63, 67.

If, therefore, under the laws of Georgia, a share of stock is property, for the purposes of taxation, the Legislature can not exempt it from taxation.

"* * Any method of the taxation of property which is "not uniform and *ad valorem* is illegal and contrary to the "plain mandates of the law." (Citing Georgia cases.) "Par. "2, sec. 2, art. 7 of the Constitution declares what prop- "erty is exempt from taxation. These subjects are purely "religious, charitable or educational, and, except as named, "no property in this State is free from the burden of tax- "ation."

Ga. B. & L. Asso. vs. *Savannah*, 109 *Ga.* 63, 67, 68.

V.

The Constitution of Georgia prohibits the Legislature from classifying property for taxation. All property not named therein as exempt, is, by the Constitution constituted one class.

"If property is taxed, all of it must be taxed except that "exempted in the Constitution. The Legislature or munici- "pal authorities can make no exemption as to property; it "must be taxed, and taxed according to its value. Though "property is a subject of taxation, the Constitution treats it "as but one subject, and prescribes the rule of uniformity as "to it by saying that all of it subject to be taxed shall be "taxed *ad valorem*."

Mayor vs. *Weed*, 84 *Ga.* 683, 686.

This construction of the Constitution of Georgia is approved in subsequent cases. It abolishes the rule of former Constitution, which permitted legislative exemption and classfiication.

Ga. B. & L. Asso. vs. *Savannah*, 109 *Ga.* 63, 67, 68.

"Thus the only classification of property relatively to tax-
"ation, that is made or authorized, is into exempt property
"and property subject to be taxed."

Atlanta National Asso. vs. *Stewart, T. C.*, 109 *Ga.* 80, 97.

VI.

This is not a case involving the right of the Legislature to exempt certain classes of property from taxation while taxing others; nor does it present the question of the right of the Legislature to classify property for purposes of taxation.

This case differs from any other case involving the question of taxing stock, which has been before this Court.

It is in no way like the case of *Sturges* vs. *Carter*, 114 *U. S.* 511. In that case the Legislature of Ohio levied a tax upon all shares of stock, excepting certain specified kinds of stock, which it exempted from taxation, and the question involved was whether the shares in question fell within the tax or within the exemption. It was conceded that the Legislature had the power both to classify shares of stock and to exempt certain shares without exempting all, and under the doctrine that the exemption would be construed strictly, the Court held that the same did not cover the shares held by Sturges.

After discussing the facts of this branch of the case the Court says:

"The claim, therefore, of the plaintiff in error is to the ex-
"emption of a certain class of his property from taxation, but
"it has been repeatedly held by this Court that the exemption
"from taxation must be expressed in clear and unmistakable
"terms, and can not be shown by doubtful or ambiguous lan-
"guage." (Citing authorities.)

"The case, therefore, depends upon the construction of the
"statute. The Supreme Court of Ohio has decided that shares
"owned by a resident of Ohio in a foreign corporation, none of
"whose capital was taxed in Ohio, but all of it in the State
"where the corporation had its home, was taxable in Ohio.

"*Bradley* vs. *Bauder*, 36 *Ohio St.*, 28. The controversy on this "part of the case is therefore reduced to the question of "whether the Legislature has clearly and unmistakably ex-"pressed the purpose in the act under consideration, to exempt "from taxation shares in a foreign corporation owned by "residents of Ohio, when but a small part of the property of "the company was subject to taxation in Ohio."

Sturges vs. *Carter*, 114 *U. S.* 511, 521.

In this case there is no question of exemption. The Legislature is prohibited by the Constitution from exempting shares of stock in any corporation from taxation, if the same are taxable property. The Supreme Court of Georgia laying down the rule as to what is taxable property, in a controversy between one of the railroads of Georgia and the Comptroller-General of the State (the petitioner in certiorari here), which railroad owned certain stock in an Alabama Railroad Company, as well as certain shares of stock in railroads in Georgia, decided as follows:

> "(*a*) Stock in the company's own road, held by "itself, or in other roads in this State, whose char-"ters limit or exempt taxation thereon, and whose "income is taxed, is not liable; and stock held by "the company in railroads without the limits of this "State is not taxable here. Stock in a railroad is "really but so many shares of its property, and that "property is real estate, for the most part, at least, "and taxable by the State in which the road is "located."
>
> "(*b*) But bonds, notes and all other mere evi-"dences of the debt follow the *situs* of the creditor, "no matter where the debtor lives."
>
> *Wright, Comptroller-General*, vs. *Railroad Co.*, 64 *Ga.* 783, 799.

Therefore, there is no question of the power of the Legislature to exempt certain classes of shares and tax others, as it

must be conceded this can not be done, and the Supreme Court of the State has held that neither shares of railroads in the State, nor those representing railroads out of the State, are taxable property within the meaning of the tax laws.

Nor is this case at all like the case of *Kidd* vs. *Alabama* 188 *U. S.* 730. In that case the Code of Alabama exempted shares of stock in domestic railroads from taxation, and under the construction of the Alabama statute by her own Supreme Court did not exempt shares of stock in foreign railroads. The question before the Supreme Court of the United States was whether such classification and exemption on the part of the State of Alabama denied to the taxpayer the equal protection of the law. This Court held that there being no question as to the power of the Legislature of Alabama, to exempt domestic railway shares, or to classify different kinds of property, the action of the State of Alabama did not deny to the taxpayer the equal protection of the law.

The Court say:

"We need not repeat the commonplaces as to the large "latitude allowed to the States for classification upon any rea- "sonable basis."

"What is reasonable is a question of practical details into "which fiction can not enter."

Kidd vs. Alabama, 188 *U. S.* 730, 733.

This case is not before this Court solely to determine, as in the Alabama case, whether the taxpayer has been denied its rights under the Constitution of the United States, but is here for this Court to pass, as fully upon the true meaning of the tax laws of Georgia and the liability of the taxpayer to pay taxes thereunder on the stock in question, as would the State Supreme Court itself, subject alone to the rule of decision that the decisions of the Supreme Court of Georgia construing her tax laws and declaring her public policy, will be accepted as conclusive by this Court.

VII.

The effect of taxing shares of stock in the hands of stockholders, and the property of the corporation in its hands, however legal, is in fact double taxation. Every presumption is against the intention to so double tax.

1. "The same may be said of a tax on the property of a "corporation, and also on the capital which is invested in the "property. If the latter is taxed as property, this also is "double taxation. * * * * * When, for instance, the "money paid in as capital of a manufacturing corporation has "been invested in buildings and machinery, these are what "then represent the capital, and to tax the capital as valuable "property, distinct from that which then represents it, would "be to tax a mere shadow. It would be to make the shadow "stand for the substance, in order that it might be taxed, "when the subtance itself is taxed directly under its own "proper designation."

Cooley on Taxation (2 *ed.*), *p.* 225.

"The most objectionable feature of a tax levy on shares of "stock is that almost inevitably it operates to impose a double "tax on a part or all of the shareholders. Such double tax exists "where either the corporate realty, or personalty, or franchise, "or capital is taxed and a tax is also levied on the shares of "stock without any deduction for the former taxation. * * "* * * The injustice of such taxation, however, generally "prevents its occurrence. The courts also do their utmost to "prevent double taxation, and will construe a taxation statute "so as to avoid such a result, and sometimes even in opposi-"tion to the plain words of the statute itself."

Cook on Stock and Stockholders (3 *ed.*), *sec.* 567.

The Supreme Court of the United States, while recognizing the power of a State to tax the property of a corporation in

its hands, and the shares of the capital stock in the hands of the individual shareholders, say:

"It is no doubt within the power of a State when not re-"strained by constitutional limitations, to assess taxes upon "them in a way to subject the corporation or the stockholders "to double taxation. Double taxation is, however, never to "be presumed. Justice requires that the burden of govern-"ment shall, as far as is practicable, be laid equally on all, "and if property is taxed once in one way, it would, ordinarily, "be wrong to tax it again in another way, when the burden of "both taxes fall on the same person. Sometimes tax laws "have that effect, but if they do it is because the legislature "has unmistakably so enacted. All presumptions are against "such an imposition."

Tenn. vs. *Whitworth*, 117 *U. S.* 129, 137.

2. The argument of petitioner is, that, because the State might, by express legislative enactment, create shares of stock, which are but an intangible evidence of the interest in the corporate property, into such separate, distinct, taxable property, therefore it must follow that the State of Georgia has recognized and created shares of stock as taxable property, distinct from the property of the corporation of which they are the symbol.

We, however, insist most confidently that Georgia has done no such thing. On the contrary she has by the uniform decisions of her courts recognized that the property of a corporation and the shares of stock evidencing the interest of its members in such corporation are no more different values than the land which one of her citizens may own, and the deed which he may hold evidencing his ownership therein.

We further insist that corporate shares are of such a character that it is entirely competent for the State to recognize that they, and the property of which they are the representatives, constitute but one taxable subject, and that a failure to tax such shares, or a declaration that they are but symbols, and not taxable property, is not an exemption, but the mere

adoption of one of the two doctrines which prevail in regard to the true *status* and nature of shares of capital stock.

3. It is admitted that Georgia rightly recognizes that the property of her corporations located in the State and the shares of the stockholders therein are but one and the same value, and that she does not attempt to tax one where the other is taxed.

It is further conceded that such double taxation would be unjust, for the reason that where the property has paid its taxes, the shares are but the symbol thereof, and the essential value has already contributed to the public good.

Why are shares less a symbol, in the absence of legislation expressly providing otherwise, where the corporation lives and its property lies out of the State? If shares are a symbol of property, where they represent an interest in a Georgia corporation, it would seem that shares in a corporation which does its business in another State, derives its franchises from another State, holds its property in another State, when held in Georgia, are nothing but the symbol of property located in another State.

They do not in this last case, even derive franchise or business value from the laws of Georgia, or protection from her government. Therefore upon principle, in the absence of compelling authority, there would seem to be no reason why shares of corporations in the State should pay no taxes, and shares of like corporations chartered elsewhere should be taxed.

Cook on Stock and Stockholders (3 *ed.*), *sec.* 565.

VIII.

The State of Georgia has always declared the capital of a corporation and the shares of its stock to be one and the same thing for purposes of taxation, and further, that shares of stock in railroad corporations whose property is located out of the State are not themselves property within the State of Georgia or subject to taxation.

As early as 1832 it was held that where bank stock is taxed in the hands of the holder, the corporation should not be taxed upon the capital which that stock represents, and that no intention to do this should be drawn from a tax act unless by express words or necessary implication.

Bank of State of Georgia vs. *City of Savannah*, *Dudley's Reports*, 130.

The exact question raised in this case was decided twenty years ago by the Supreme Court of Georgia, and the decision has very recently been approved by that court.

It appears by the record of the original case, of file in the Supreme Court of Georgia, that the Southwestern Railroad Company by its return showed that it owned certain shares of stock in some railroad companies of Georgia, and certain shares of stock of a railroad company of the State of Alabama. The State claimed, among many other contentions, that the Southwestern Railroad Company should pay taxes on all of these shares of stock. The railroad company resisted this claim. On this contention the Supreme Court of Georgia decided :

"(*a*) Stock in the company's own road, held by itself, or in "other roads in this State, whose charters limit or exempt "taxation thereon, and whose income is taxed, is not liable ; "and stock held by the company in railroads without the "limits of this State is not taxable here. Stock in a railroad "is really but so many shares of its property, and that prop- "erty is real estate, for the most part at least, and taxable by "the State in which the road is located."

"(*b*) But bonds, notes, and all other mere evidences of debt "follow the *situs* of the creditor, no matter where the debtor "lives."

Wright, *Comptroller-General*, vs. *Railroad Co.*, 64 *Ga.*, 783, 799.

In another more recent case the Supreme Court of Georgia say on the status of stock as taxable property :

"There are, in general, four methods of taxing corporate "interests. These are: 1st, by a tax on the franchise; 2d, "on the capital stock; 3d, on the real estate and personal "property of the corporation; 4th, by a tax on the shares of "stock in the hands of the stockholders. *1 Cook on Stock, &c.* "(*3d ed.*), *sec.* 561. See also, *2. Redf. Rwy.*, 453, and au- "thorities cited. It is not incumbent on the taxing power to "impose a tax on each, but it may do so; and while, as a rule, "double taxation is properly not favored, whether it will be "imposed or not rests with the taxing power—originally the "Legislature. The decision in *Mayor of Macon* vs. *Macon* "*Construction Co.*, 94 *Ga.* 201, is not in conflict with the doc- "trine here announced."

Georgia B. & L. Asso. vs. *Savannah*, 109 *Ga.* 63, 70-1.

Since this case has been in this court, the Supreme Court of Georgia has reaffirmed this decision in the 64 Georgia Report, 783, above quoted.

"In *Wright* vs. *Southwestern Railroad Company*, 64 *Ga.* 799, Justice Jackson said: "Stock in a railroad is really but so "many shares of its property, and that property is real estate "for the most part at least, and taxable by the State in which "the road is located."

Peoples Nat'l Bk. vs. *Cleveland*, 117 *Ga.* 908, 915.

This fixes the public policy of Georgia and its election to treat shares of stock as mere representatives of property, and not as property itself, and, therefore, as not the subject-matter of taxation.

It will be observed, moreover, that the provision of the Constitution does not undertake to define *what is property within the territorial limits* of the authority levying the tax.

It undertakes to make no change in the decisions recognizing shares of stock not as property, but as mere evidences of an interest in the property of the corporation itself; so that the question at last is unaffected by the provision of the Constitution, and recurs; whether under the law of the State

of Georgia, as declared by her courts, shares of stock are necessarily property different from the property held by the corporation, or are, like a bill of lading, a warehouse receipt, or other symbol, mere representatives of such property.

We answer these questions in the language of the Supreme Court of Georgia above quoted:

"Stock in a railroad company is really but so many shares "of its property, and that property is real estate, for the most "part at least, and taxable by the State in which the road is "located."

Again, "stock * * * in railroads without the limits of this "State is not taxable here."

64 *Ga.* 799.

IX.

No statute has been passed by the State declaring shares of stock in foreign railroad companies property within the State of Georgia and levying any tax thereon.

1. The law claimed to tax this stock was the Tax Act of 1878, which contained certain questions to the taxpayer. These questions were:

"In addition to the questions now propounded to taxpayers "by the tax-receivers, questions shall be framed by the comp- "troller-general to reach all property upon which a tax is "imposed by this act, and especially the following questions."

The 30th question is as follows:

"How many shares of stock did you own on the day fixed "for the return of property for taxation issued by corpora- "tions located without the State?"

"31st. What was the gross nominal value thereof?"

"32d. What was the fair market value thereof?"

"33d. How many shares of stock did you own on the day "fixed for the return of property for taxation, issued by cor- "porations within the State, the capital stock of which or the

"property of which is not returned by such corporation for "taxation ?"

"34th. What was the gross par value thereof ?"

"35th. What was the fair market value thereof ?"

No tax is here levied—only information is sought.

A purpose to levy a tax is never presumed, it must be clearly expressed.

Desty on Taxation, p. 199, *sec.* 39.
Cooley on Taxation, p. 165.
Endlich on Interpretation of Stat., sec. 345.

"Statutes levying duties or taxes upon subjects or citizens "are to be construed most strongly against the government "and in favor of their subjects or citizens; and their pro- "visions are not to be extended by implication beyond the "clear import of the language used."

Mayor &c. of Savannah vs. *Hartridge,* 8 *Ga.* 23, 30.

If this act shows any intent, it shows an intent not to tax shares in domestic railroad corporations. It can not exempt these.

To hold this act as taxing foreign railroad shares as property, would make the Legislature declare shares *property* and then *exempt* domestic shares. Such an Act would be unconstitutional as exempting property.

Georgia B. & L. Asso. vs. *Savaunah,* 109 *Ga.* 63, 68 *and cases cited supra.*

"Laws which indirectly produce such exemption must be "equally inoperative. That can not be accomplished indirectly, "which the organic law declares shall not be done directly."

Huntington vs. *Worthen,* 120 *U. S.* 97, 101.

It could not constitutionally adopt the rule contrary to the

Supreme Court decision, and declare all railroad shares property and not evidences or interest alone, because as to domestic railroad shares it declares it does not propose to do this, or to tax them.

Virginia Coupon Cases, 114 *U. S.* 269, 305.

If it leaves the rule that shares are not property and then seeks to tax some, as the Legislature of Georgia can not classify *property* for taxation or exempt it, it discriminates. It denies the equal protection of the laws to the owners of certain shares of stock by taxing them, while leaving the owners of other shares of stock untaxed.

Travellers Ins. Co. vs. *Connecticut*, 185 *U. S.* 364.

County of Santa Clara vs. *Railroad Cos.*, 18 *Fed. R.* 385, 394, 395, 399, 401.

It would also violate the Georgia Constitution. Under that property can not be classified except as that constitutionally exempt and constitutionally taxable. If *shares* are property, then *all* are taxable.

If this act taxes those in foreign railroads and not in domestic, it does not tax uniformly or ad valorem all species of property subject to the tax (that is all property not exempt by the Constitution).

Georgia B. & L. Asso. vs. *Savannah*, 109 *Ga.* 63, 68, *and cases cited supra.*

If the questions seek only information so that it can be seen if there are any foreign shares which are in corporations whose assets are such that the shares are taxable, such as insurance and banking companies, and if it assesses no tax on shares of foreign corporations where like domestic shares are not property within the meaning of the tax laws, then it is constitutional. This construction of it must therefore be adopted.

"It will always be presumed that it is the intention of the "General Assembly to obey and not to violate the Constitu- "tions, when one of its acts is susceptible of two construc- "tions, one violative of the Constitution and the other in con- "sonance therewith, the latter construction must be adopted. "An act of the General Assembly will never be construed as "violative of the Constitution, unless its terms are such as to "absolutely demand such a construction. The propositions "thus stated are elementary rules of law."

Park vs. *Candler*, 113 *Ga.* 647, 667.

2. The other Statutes and Code sections cited by petitioner's counsel do not bear on this question.

The citation in petitioner's brief of section 16, par. 30–1–2 of the Act of 1898 as to what the agent of a non-resident should return for taxation, because it enumerates *stocks, inter alia* as property to be returned for taxation, does not help the contention of appellant.

This section does not impose any tax; it simply provides by whom taxes due from a non-resident can be returned. The mention of stocks means *such stocks* as a resident would have to pay on. It does not intend to tax *all* stocks. Stocks representing interests in fixed properties were not being aimed at. If so, why are not domestic railroads and factory stocks taxed? It is admitted that they are not, and should not be, whether owned by a resident or a non-resident, because *not taxable property.*

Counsel for petitioner has also cited the second section of the act passed by the Georgia Legislature at the session of 1884–5, which he claims indicates the intention of the Legislature to make stock of railroad companies incorporated without the State of Georgia, but held by citizens within the State, liable to taxation, when shares in like corporations created by the State of Georgia are recognized as non-taxable.

We submit that the act not only does nothing of the sort, but that it furnishes evidence of a different intent.

First. This section of the act provides that

"personal property shall be construed for the purposes "of taxation to include all goods * * * all stocks and "securities, whether in corporations within this State or "in other States, owned by citizens of this State, etc."

Distinguished counsel for appellant says that is declaratory of the general policy of the State, and of the legislative intent that all personal property shall be construed to include for purposes of taxation all "*stock in foreign corporations*" owned by citizens of this State.

We insist that it is *expressly declaratory that all stocks and securities of corporations in this State, or in any other States, stand upon exact equality of treatment*, towit: that such as, according to the decisions of the Supreme Court of Georgia theretofore made, represent fixed property, such as railroads, which properties are taxed where located, were not within the eye of the law property for taxation.

Wright, Comptroller-General vs. *Southwestern R. R.*, 64 *Ga.* 782, 799.

Had the purpose been otherwise the act would have read that "personal property shall be construed," etc., to include, etc., "all stocks and securities in corporations *in other States* owned by citizens of this State,"—but it expressly declined to thus discriminate.

Second. The Act in question furnishes evidence that it did not propose to include all stocks, and to change the ruling made in 64 Ga., above quoted, but merely to reach such stocks as do not fall within the class described in such decision.

The same act in section 1st thereof, in specifying the property to be enumerated to the tax-receiver, says:

"The amount of capital invested in stocks of com-
"panies other than such companies as are required to be
"returned by the president or other agents, either to the
"Tax-Receiver or the comptroller-general."

Acts of 1884–5, *pp.* 28, 29.

Third. If this act had any such meaning (which we deny), it is no longer the law of Georgia, and its repeal has been recognized.

In 1895 the Legislature of Georgia adopted a new Code. This Code was compiled under authority of an act of the Legislature, to be found in the preface of the 1st volume of the Code of Georgia of 1895, page xv, which provides that

"it shall be the duty and power of the Code commis-
"sioners to codify and arrange in condensed form the
"laws now in force in Georgia, from whatever source
"derived."

After this Code was prepared, it was adopted by an act of the Legislature, to be found in the same preface, page xix, by which the said Code so prepared was adopted and made of force as the Code of Georgia.

This Code does not contain the 2d section of the Act of 1884–5, quoted by counsel for appellant. It does contain the 1st section and the 3d section, which, as amended by a subsequent act, are to be found in volume 1, sections 833 and 834 of the Code.

Its omission is significant. It was not an oversight, as the codifiers had their attention upon the act.

Learned counsel say that it is in substance in the Code, and that if not in the Code it is still the law.

We think it is *in substance* in the Code. We think that it did not change the former law, and was recognized by the codifiers as not changing the previous law laid down by the Supreme Court, distinguishing what stock was returnable for taxation; but as merely directing attention to the return of stock, for fear lest such stocks as were taxable, *as not repre-*

senting fixed properties returned for taxation, might be omitted, and that the codifiers did not consider it necessary to encumber the Code with it.

If this is not the case, then in so far as this section of the Act of 1884–5 changed the pre-existing law, the codifiers evidently considered it in conflict with subsequent legislation, and omitted it, and the Legislature adopted the Code including therein the 1st and 3d sections of the Act of 1884–5, but omitting the 2d section.

Counsel for appellant have quoted authority to the effect that law omitted from the Code, but not inconsistent therewith, is notrepealed by the adoption of the Code.

The original Code of 1863 contained an express provision that such law should still remain of force, and such a provision was continued in the Code of Georgia for many years. It is noteworthy that no such provision is to be found in the Code of 1895, or in the Constitution of the State of Georgia, declaring what laws are of force in the State.

Code of Ga. of 1895, *Vol. I., Sec.* 1.
Code of Ga. of 1895, *Vol. II., Sec.* 5932.

But, conceding that such is still the rule, the deliberate omission of a section of an act from the Code is certainly high evidence that it was either not considered to be the law when the Code was adopted, or that its provisions did not alter or add to the law as defined in other sections of the Code.

Mitchell vs. *Railway Co.*, 111 *Ga.* 768, 769, 770.

The Code of Georgia shows that foreign stocks are not taxed by the provisions readopted in 1895, as to such taxation.

"Bonds, notes, or other obligations for money, on persons "in other States, or of other States, or *bonds of corporations* "*of other States,* and shipping, are the subject of return and "taxation in this State."

Code of 1895, *Vol. I., Sec.* 776.

The use of the words "bonds of corporations," without in-

cluding the word "stocks," is significant, especially when construed in the light of the above decision of the Supreme Court in regard to the non-taxable character of stock representing an interest in a foreign railroad, and the clause in said decision which provides that such bonds are taxable.

64 *Ga.* 799.

4th. None of the sections of the Code quoted as substantially embodying this second section of the Act of 1884–5 have any bearing whatever upon the question presented in this case.

Section 833 Vol. I., of the Code, is merely the codification of certain questions relating to taxpayers, and is drawn from section 1st of the Act of 1884–5, page 28 (margin page 8 being a misprint), as amended by the Act of 1886. It clearly can not be considered as codifying the 2d section of the Act of 1884–5, when it expressly codifies the 1st section of the act, and the amendment to said 1st section alone.

Section 2165 of Vol. II. of the Civil Code has no bearing whatever upon the question of whether stock in a foreign corporation is taxable property, nor can it be a codification of the 2d section of the Act of 1884–5, for the reason that it is a part of the general law for the incorporation of railroads in Georgia, enacted by the Legislature in 1892, and provides that shares of stock in railroads located in Georgia, chartered under her general law, shall be personal property. Nobody contends that the Legislature of Georgia ever intended attempting to make such shares taxable property where she collects a tax upon the railroads located in her midst. It is also a mere repetition of Code, section 3070.

Section 3070 of Vol. II. of the Civil Code, can not aid the question, as it is a section of the law which was in the original Code of 1863, and was in existence just as it now stands when the Supreme Court held in the case of *Wright, Comptroller-General*, vs. *Southwestern Railroad*, 64 *Ga.* 799, that stock in a railroad located out of the State was not property within the State of Georgia subject to taxation.

X.

It is conceded that Georgia does not, and should not tax shares of stock in domestic railroads. She can not exempt them, but recognizes that railroad shares are not taxable property.

"It is conceded by counsel for the Comptroller-General "that the State has not attempted to tax shares in domestic "corporations, and that it would be wrong for it to do so." (Transcript, pp. 16, 17.)

The agreed statement of fact states: "It is further agreed "that stockholders in the Atlanta & West Point Railroad Com-"pany, the Georgia Railroad and Banking Company, the Au-"gusta and Savannah Railroad Company and of all corpora-"tions which pay taxes upon their property do not return "their shares of stock for taxation." (Transcript, p.12.)

This is done under the authority of the ruling of her Supreme Court that a railroad share is but the evidence of an interest in property taxed where situated.

Wright, Comptroller-General vs. *R. R. Co.*, 64 *Ga.* 783, 799.

People's Natl. Bank vs. *Cleveland*, 117 *Ga.* 908, 915.

This same definition states as a necessary conclusion therefrom that:

"Stock held by the company in railroads without the limits "of this State is not taxable here."

Wright, Comptroller-General. vs. *R. R. Co.*, 64 *Ga.* 783, 799.

The State has not exempted and can not exempt these shares, if property, from taxation.

If shares held by the same person in a Georgia railroad

corporation are not property liable to taxation because mere evidences of an interest in the railroad and corporate properties held by the Georgia corporation, how can it be held that shares in a like corporation of Alabama are not equally property liable to taxation, and are not like evidences of an interest in the railroad and other corporate property located in Alabama, upon which property all taxes it is adjudged (Transcript p. 12) have been paid?

Let it never be forgotten the question is: Is a *railroad share* in Georgia taxable property?

The Georgia Supreme Court has said it is not.

Wright, Comptroller-General, vs.. *R. R. Co.*, 64 *Ga.* 783, 799.

People's Nat'l Bank vs. *Cleveland*, 117 *Ga.* 908, 915.

XI.

Where Constitutions prohibit exemptions, and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed, are valid, and where such Constitutions prohibit double taxation, are generally imperative.

If shares of stock are separate property from capital representing the same, held by the corporation, then of course it makes no difference where the corporation is located,—an exemption of such shares from taxation because the corporate property is taxed would violate a constitutional provision prohibiting the exemption of property. On the other hand, if such shares of stock can be regarded as mere symbols of property within the State in the hands of her own corporations, they can necessarily be regarded as symbolic of property without the State, and as therefore not representing property within the limits of the taxing power.

Mr. Thompson, in his work on corporations, recognizes the existence of a line of decisions which hold:

"Where a tax is laid upon the property of a corporation, "whether in the name of capital or in the form of a tax upon "the tangible property into which its capital has been trans- "muted—another tax assessed against the shareholders upon "the shares held by them of the capital stock of the corpora- "tion, is double taxation and not permissible."

2 *Thompson on Corporations, sec.* 2813.

The identity of the shares and of the capital of a corporation is recognized by the Federal government in its provisions regarding the taxing of national bank stock.

2 *Thompson on Corporations, sec.* 2814.

Under a constitution which provides for taxing the property of corporations, the same as individuals; and, further, that uniform laws shall be passed taxing investments in bonds, stocks, &c., it is held, that to tax both the stock in the hands of the shareholder and the property of the corporation is inconsistent, because unequal taxation.

Cleveland Trust Co. vs. *Lander*, 56 *N. E. Rep.* 1036, 1040.

Says the Supreme Court of Pennsylvania:

"Such taxation (viz.: on the capital and the shares in the "hands of the holders), notwithstanding the subtle distinction "of the court below, would be substantially double taxation. "Conceding the power of the Legislature to tax in this man- "ner, its exercise is never to be presumed. The intent to "impose double taxation must be clearly expressed."

Penna. Co. &c. vs. *Commonwealth*, 15 *Atlantic Rep.* 456, 458.

The Constitution of Indiana, section 1, article 10, directs that the Legislature shall provide by law for a uniform and equal rate of assessment and taxation. It also provides for the taxation of all property except certain property therein

excepted. Under such Constitution, the Supreme Court of Indiana has held that a provision prohibiting taxation of shares of capital stock where that which gives it its value has already been taxed in the hands of the corporation, is not an exemption, but the prohibition of double taxation.

Hyland vs. *Central Iron & Steel Co.*, 13 *L. R. A.* 515.

An act providing for taxing the property of a corporation, and providing that its shares of stock shall not be taxed, is not unconstitutional under a constitution providing that all property shall be taxed equally and prohibiting legislative exemptions. Such a provision "is not in fact an exemption, but "only a different mode of assessment of property."

Carroll vs. *Alsup et al.*, 64 *S. W. Rep.* 193.

See also to the same effect:

Lewiston Co. vs. *Asotin County*, 64 *Pac. Rep.* 544.
Foster vs. *Stevens*, 13 *L. R. A.* 166, 169.
Bank vs. *Nashua*, 46 *New Hampshire*, 389.
Sherman vs. *Kimball*, 54 *New Hampshire*, 406.

It may be of advantage to consider that the State of Alabama taxes railroad properties not upon the value of their property as so much material, but upon the full value of the railroad as a going concern.

Code of Alabama of 1896, *sec.* 3972.

XII.

The rule of property, or of taxation, established in a State by the decisions of her Courts, will be followed by the Federal Court in dealing with such property or taxation.

1. In this case the Supreme Court of Georgia has established as a rule of property, that shares of railroad stock represent the property of the corporation. That such property is the subject of taxation, where located, either within or with-

out the State, but not the shares, which are mere representatives thereof.

Railroad Co. vs. *Wright*, 64 *Ga.* 783, 799.

Where a rule of property is established by the State decisions, it will be followed by the Federal Courts.

Foster vs. *Elk Ford, &c. Co.*, 32 *C. C. A.* 560.
Buford vs. *Kerr*, 33 *C. C. A.* 166.
Warburton vs. *White*, 176 *U. S.* 484.

2. The decisions of the State Courts as to State taxation, where not impairing some right claimed under the Constitution of the United States, will be followed by the Federal Court.

Lewis vs. *Munsen*, 151 *U. S.* 545, 549.
Bardon vs. *Land & R. Imp. Co.*, 157 *U. S.* 327, 331.

Jos. B. & Bryan Cumming,
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of Counsel.

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In the Supreme Court of United States

WM. A. WRIGHT, COMPTROLLER GENERAL,
APPELLANT,
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THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND
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APPELLEES.

20.
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Brief of JOS. B. CUMMING for Appellees.

APPELLEES' STATEMENT OF THE CASE.

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Brief of JOS. B. CUMMING for Appellees.

APPELLEES' STATEMENT OF THE CASE.

The Georgia Railroad and Banking Company and the Central Railroad and Banking Company of Georgia were equal owners, as tenants in common, of The Western Railway of Alabama.

May 7, 1881, The Georgia Railroad and Banking Company leased its railroad property, including its half interest in the Western Railway of Alabama, to William M. Wadley and his assigns, for a term of ninety-nine years. By different assignments the appellees have become the lessees, and were such when the tax in question was demanded.

Said Western Railway of Alabama lies in the State of Alabama except one quarter of a mile in the city of West Point, Georgia.

The two above named owners of said Railroad held the same without any charter or act of incorporation until the———day of 188— when they were incorporated by the laws of Alabama under the name of The Western Railway of Alabama Company. The property was divided into 30,000 shares of $100 each, and

each owner received 15,000 of said shares, but the shares received by The Georgia Railroad and Banking Company were covered by said Lease and are enjoyed by the Lessees.

While The Georgia Railroad and Banking Company had leased all its property, the same was returned in its name and by it to the Comptroller General under the laws of Georgia for taxation.

The blanks, annually furnished by the Comptroller General to The Georgia Railroad and Banking Company to be used in making its tax returns, contained amongst others, the following question, to-wit: "Number of stocks and bonds owned by the company and value of all property not enumerated and value of tools?" In no other way than in furnishing these blanks did the Comptroller General make any demand for taxes upon said fifteen thousand shares of stock until about the 25th day of May, 1901, when he specifically demanded of The Georgia Railroad and Banking Company that it pay taxes on said shares of stock for the year 1900 to the State of Georgia, which said taxes so demanded amounted to between $7,000 and $8,000.

It is provided by the aforesaid Lease that whatever taxes are collectible on said stock during the entire term of the lease are payable by the lessees; or if the same are lawfully collected from The Georgia Railroad and Banking Company, the lessees are bound to reimburse said last named company without any deduction from the rent, which said lessees pay.

The stockholders in the Atlanta and West Point Railroad Company, The Georgia Railroad and Banking Company, The Augusta and Savannah Railroad Company and in all corporations, which pay taxes upon their property to the State of Georgia, do not return their shares of stock for taxation.

The corporation, The Western Railway of Alabama, has regularly paid all State and County taxes required of it in the State of Alabama.

The Comptroller General of the State of Georgia, on the failure of The Georgia Railroad and Banking Company to pay taxes for the year 1900 on said 15,000 shares of stock, threatening to issue execution against said Company as the owner of said shares for said taxes, Appellees filed their bill against him and also

against The Georgia Railroad and Banking Company to enjoin the collection, alleging as to the last named defendant that it would either pay the tax and call upon appellees to refund the same, or it would permit the leased property to be taken in execution and sold for payment of the same—and thereupon applied for an injunction against both defendants.

On the hearing of the cause the Circuit Court granted the injunction and made the decree which was appealed from to the Circuit Court of Appeals of the Fifth Circuit—which Court affirmed the judgment of the Circuit Court. The case is now here by writ of certiorari to the Circuit Court of Appeals.

The 10th paragraph of the Petition for Certiorari sets forth the general contention of the State of Georgia thus:

"The contention of the State of Georgia is that since the Constitution of 1877, all property not exempt by that Constitution is taxed, and that the legislature not only has not exempted, but cannot exempt, any item of property, not specifically mentioned in that Constitution; and that inasmuch as shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself, these shares are taxable to the owner at its domicile, no matter where the property of the corporation may be located."

Let us dissect this general proposition by separating the various sub-propositions which go to make up the whole.

a. All property not exempted by the Constitution is taxable.

b. The legislature has not exempted any item of property not specifically exempted by the Constitution.

c. The legislature has no power to exempt such property.

d. The shares of stock are property in the holder thereof, separate and distinct from the property of the corporation itself.

e. These shares are taxable to the owner thereof, no matter where the property of the corporation may be located.

Appellee can admit allegation b.

Also allegation c.

Also allegation d.

Appellee can admit allegation a, if it is guarded and kept within the bounds of its true meaning and of its territorial limits

by the insertion at the proper places of the words "situate within the State" and "once," so that it will read: "All property situate within the State, not exempt by the Constitution, is taxed once."

Appellee cannot admit allegation e; but on the contrary appellee contends that the domicile of the corporation is, for the purpose of taxation, the *situs* of the stock.

Appellee contends, therefore, that appellant can succeed only by showing:

FIRST, That the property, which he seeks to tax, is situated in the State of Georgia; and SECOND that the tax sought would not be double taxation.

The requirement of the State Constitution in the matter of taxation is fully complied with when any designated property has fairly borne its share of taxation *once*. The Constitution neither requires nor favors double taxation, and such double taxation is no more required by the Constitution when, though double in fact, it is not so technically and may be indirectly enforced, than when it is directly imposed. In a word, the Constitution is satisfied with a substantial compliance with its requirement, and when property has paid its share of tax, the Constitution does not require that same property to be taxed again though under a different name, and though such duplicate taxation is in harmony with a recognized technical right to tax again. The mandate of the Constitution is to tax *everything*: not to tax anything or some things *as often as you can.*

The case most relied on by Appellee for his general proposition as to the universality of taxation, to-wit Atlanta Nat. Assn. vs. Stewart, 109 Ga., 81, does not give any support to the propoistion that there is an *obligation* to impose such duplicate taxation; but *per contra.* See page 98.

DOUBLE TAXATION.

Appellees do *not* contend:

That double or duplicate taxation is illegal: or
That the Legislature of Georgia has *not* the power to tax the

property of a corporation and also the shares, into which the property of the corporation is divided.

The proposition, for which Appellees *do* contend and which, they also contend, controls the case, is:

That no competent authority in the State of Georgia has *in fact* levied a tax on the shares of stock of a corporation in the hands of the shareholders. For the aid, in the way of interpretation, which it gives to the establishment of *this* proposition, the discussion of double or duplicate taxation is entered upon.

The proposed tax, though not technically double taxation, is such practically and substantially, in that it imposes a double burden on the same property and the same real tax payer. The railroad in Alabama is valued at $3,000,000 and fully taxed there. The shares in Georgia are the same $3,000,000. There are not two properties each worth $3,000,000; but a single property worth that sum. This is the substance of the thing.

If the shares are taxed in Georgia, it will be the shareholder who will pay the tax. It is the shareholder who pays the tax levied by Alabama on the property represented by the shares. The tax, wherever and in whatever form paid, is in fact paid by the shareholder. The substantial owner and not the property pays the tax.

Cooley on Taxation, 1289-90.
Burroughs on Taxation, See 7.
Rundell vs. Lakey, 40 N. Y., 513, 517.

The State of Georgia has always and from the earliest times in its history regarded the taxation of both the corporate property and the shares as double taxation.

Bank of Georgia vs. Savannah Dudley's Reports, 132.

The general policy and practice of the State is to tax the corporations and not shares of their stock. The only departure therefrom is in the case of banks; but this departure is made

necessary by the provisions of the National Bank Act, which oblige the State to tax the shares of its own banks in order to be able to get any tax from National Banks within its borders. Having for this reason taxed the *shares*, it leaves the *property* of the banks untaxed.

See Section 12 of Tax Act of 1900.
Acts of 1900, pages 33-34.

Its general policy and practice not to tax *both*, the corporation and the shares, are strongly emphasized by this variation from its general practice in the matter of taxing corporations.

The State, in dealing with domestic corporations generally, demands the return of shares only when the property of the corporation itself is not returned and taxed.

See 33d question of Tax Act of 1898. Acts of 1898, page 36.
See in this connection Rome Railroad vs. Rome, 14 Ga., 275.
Goldsmith, Compl. Gen. vs. Rome Railroad, 62 Ga., 473.

Courts in other jurisdictions take the same view.

Massachusetts. A tax on the real estate of a bank in addition to a tax on shares, whose value is made up in part by real estate, is double taxation.

Tremont Bank vs. Boston, 1 Cushing, 142.

A tax on the Railroad Company's property could not be sustained for the reason that the value of the property thus taxed was included in the value of the shares, which are already taxed.

Middlesex R. R. Co. vs. Charlestown, 8 Allen, 330.

New Jersey. A tax Act exempted from taxation "so much of the property of incorporated companies represented by the capi-

tal stock thereof as by virtue of this Act is taxed in the hands of the stockholders."

HELD that under this Act no property held by the corporation could be taxed: for says the Court "it is perfectly clear that the capital stock in the hands of the stockholders represents the entire property of every incorporated company."

The Belvidere Bank vs. Tunis, Collector, 23 New Jersey L., 546.

MARYLAND. The Tax Act of 1841 made very sweeping provision for taxing all property. Nevertheless assessments made upon the real estate, furniture and fixtures of the bank and houses and lots, which the bank held as proprietor, were set aside, the Court holding that the property of a bank being represented by the shares therein, both cannot be taxed.

"A system of indirect taxes combined with a system of general taxation by value must often have the effect to duplicate upon some species of property and some persons, and the taxation of stockholders in a corporation and also of the corporation itself must sometimes produce a like result."

Cooley on Tax, 3d Ed., 387. See also
Whitworth vs. Tenn., 117 U. S., 136.
New Orleans vs. Houston, 119 U. S., 277.

Counsel for Appellee claim nothing for the foregoing further than that it establishes the proposition that a tax on the corporation for its property and on the shares in the hands of its shareholders is double taxation: that in such a case the one only actual taxpayer, the real and beneficial owner of the property—the shareholder—pays two taxes on one and the same property; and that the State of Georgia recognizes that fact.

"But we make out no conclusive case against a tax when we show that it reaches twice the same property for the same purpose."

Cooley on Tax, 3d Ed., 392-3.

But when we show double taxation, we raise a presumption that the construction of a law, which produces that result, is not the correct construction, and such construction will not be admissible unless required by express words or necessary implication. For "it has been very properly and justly held that a construction of tax laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the Statute or by necessary implication. It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party either directly or indirectly: and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the Legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time. This is a sound and very just rule of construction, and it has been applied in many cases where, at first reading of the law, a double taxation might seem to be intended."

Cooley on Tax, 399-400, 3d. E.
Bank of Georgia vs. Savannah, Dudley, 130 (Corporation and Shares of Stock).
Tennessee vs. Whitworth, 117 U. S., 129. (Capital and Shares).
New Orleans vs. Houston, 119 U. S., 277.

Such being the requirements of the law before double taxation can be imposed, it is incumbent upon appellant to show some express enactment imposing a tax on these shares. Such enactment is not to be found in the tax Act of 1898, under which this tax is claimed; for while that act provides in the only section which could have a bearing on this subject, that a tax shall be levied on "all of the taxable property in this State," it is conceded that this provision of the Act, or indeed any other enactment, does not reach shares of stock of domestic corporations. There is quite as much law to tax *them* as there is for the taxation of the shares involved in this litigation.

The claim of the Comptroller General of a right to tax these shares may be stated thus: The Constitution requires all the property in the State, except expressly exempted property, to be taxed. The mandate of the first section of the Tax Act of 1898 "to levy and assess * * * a tax * * * on all of the taxable property in this State" is sufficient "machinery" to bring in all property in this State. These shares are property in this State. *Ergo,* there is law sufficient to tax them.

This argument is just as applicable to the shares of other corporations, which are confessedly not taxed. The Comptroller General, to sustain his claim, is under the necessity of differentiating the *status* of these shares from the *status* of those, which are admittedly not taxed. His position is that the difference is found in the 30th of the questions propounded under the Tax Act of 1898—See Acts of 1898, page 30. Said question is as follows: "How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?"

The position of the Comptroller General on this point in the case may be stated somewhat after the manner of an algebraic problem, thus: The Constitution of the State and the Tax Act of 1898 make up the law applicable to shares in domestic corporations, whose corporate property is taxed. The Constitution of the State and the Tax Act of 1898, plus question 30 of the Act, make up thelaw applicable to shares in foreign corporations whose property is taxed.

Now if the factors common to both propositions, to-wit: the Constitution of the State and the Tax Act of 1898, are eliminated by cancellation, the tax demanded in this case rests alone on question 30.

Double taxation cannot rest on such a foundation. The perversion of a question from its primary function of eliciting information as a basis for further action, and the erection of it into the force of an express enactment, imposing double taxation, is something abhorrent to the well settled principles of strict construction of tax acts generally, and especially as to double taxation.

Besides the general principles which deny to mere questions

such potentiality, an examination of the [illegible]tions, associated in the same category with question 3[illegible] w[illegible] [illegible]ows that it is not entitled to any such high consideration. [illegible]ttention is especially directed in this connection to questions 2, 13 and 42.

UNIFORMITY.

The proposed tax is relatively to the citizens of the State a glaring departure from the rule of uniformity and equal fair dealing, which the letter and spirit of its tax laws enjoin. There is no meritorious reason why the holder of these shares should be taxed and the holder of the shares of the Atlanta & West Point Railroad Company, for instance, should not be taxed. In both instances their relations to their respective corporations are the same. In both instances the tax, if imposed on both, would affect them equally, and, if imposed on one only, would be, to its full extent, an unequal burden.

Now, the uniformity and equality provisions of tax systems are the *citizen's* side of the problem. The Government's concern for itself is to raise a sufficient revenue. Its concern for its *citizens* is to make the burden, so far as practicable, equal and uniform on all. It is for its *citizens* that it devises measures of uniformity and equality.

"Theoretically tax laws should be framed with a view to apportioning the burdens of government so that each *person* enjoying government protection shall be required to contribute so much as is *his* reasonable proportion, and no more. The tax law that comes nearest to accomplishing this is, in theory, the most perfect."

Cooley on Taxation, 1st Ed. 36 Ed.

"Equality and justice are constantly to be aimed at."

Ibid. 322.

III.

THE STATE OF GEORGIA HAS NOT IN FACT TAXED THESE SHARES.

Up to this point I have considered those principles of construction of the laws from which, when applied to the facts of this case, the deduction may be drawn that the State of Georgia has not in fact levied a tax on these shares. I now proceed to point out some direct and positive grounds for [illegible] that the tax has in fact not been laid.

Story: "It would seem to be an axiom that a State has no right to impose taxes upon persons or property beyond the limits of the State; its sovereignty extends no further."

Burroughs on Taxation, Sec. 40

"The true principle on which to declare whether personal property is liable to be taxed is the place of the proprietor."

Dicey on Taxation, page 60

"As to real estate it has never been claimed that such property could be taxed by any State other than that in which it is situated. And the same rule seems to be applicable to personal property; but the difficulties arise in the application of the principle."

Burroughs on Taxation, Sec. 40

Then quoting to the last paragraph of the same section, after stating the general rule to be that choses in action are taxed at their actual situs without reference to the residence of their owner, says that there is some conflict of authority in reference (among other things) to stocks of corporations.

Burroughs on Taxation, Sec. 40

"The power of taxation by any State is limited to persons, property or business within its jurisdiction."

Tappan vs. National Bank, 19 Wall, 490-499.

Authorities might be multiplied indefinitely to show the territorial limitations of the taxing power. The Constitution of Georgia provides for a property tax only on the property within "the territorial limit of the authority imposing the tax." The Tax Act of 1898, under which these taxes are sought, levies a tax only on the taxable property "in this State." Indeed the proposition is axiomatic.

The most obvious subject of taxation by Georgia laws is the real estate situate, lying and being in the State of Georgia. Another obvious subject of taxation by those laws is personal property, having a physical *situs* within the territory of the State, such as animals, vehicles, etc.

Not so obviously, but still unquestionably, *choses in action*, belonging to residents of Georgia, are subjects of taxation by those laws. They (*choses in action*) are incapable of physical *situs*. They are intangible, and the law not having the guide or test of actual physical *situs*, has long since settled arbitrarily that they attach to the person of the owner, and are, in contemplation of law, where the owner is.

Other personal property may have its *situs* in a jurisdiction other than that in which the owner of the property resides. It is then taxable in such other jurisdiction. This rule applies clearly to tangible personal property, such as animals, vehicles and the like, capable of having an actual physical *situs*.

A vital inquiry in this case is to ascertain in what class or category are shares of stock of an incorporated company? Where is their *situs?* Is it with their owner or is it where the corporate property itself is?

Nowhere, I assert with some confidence, are shares deliberately designated *choses in action*. Instances may be found where Courts dealing with the status of other property and not of shares of stock, have used in a general enumeration the phrase

choses in action as applicable to bonds, promissory notes, open accounts, other evidences of indebtedness and shares of stock. In places, also, Courts have spoken of shares of stock as being in the "nature of *choses in action.*" But it is doubted whether any Court has deliberately and on consideration so entitled them. Neither would it seem accurate to say that shares of stock are "intangible." The certificate, which is held by the owner as evidence of his ownership, is in itself not intangible any more than is a deed evidencing the title of an owner to real estate. The property, of which the certificate is the evidence, is certainly not intangible—and herein is a marked difference between "mere *choses in action*" and shares, and the analogy between certificates and deeds very close. Shares of stock seem to be different in some respects from any of the subjects of taxation above mentioned. They are in this respect *sui generis.* According to authority and established principles of law their *situs* can be fixed arbitrarily. Where this has not been done, where, as in the State of Georgia, there is no enactment, direct or indirect, on the subject, a Court, in seeking to ascertain the *situs,* should do so in such a way as to avoid injustice and oppression, which double taxation is admitted to be, though it may be legal. The natural equities and the presumption against double taxation should incline the Court to let even slight legal reasons turn the scale in favor of the tax payer.

No *enactment of the Legislature* of Georgia has ever fixed in Georgia the *situs* of shares of stock held by citizens of Georgia in foreign corporations.

The *courts* of Georgia, so far as they have spoken at all on this subject, have indicated that the *situs* of such shares is in the jurisdiction where the corporate property was located.

Dearing vs. Bank of Charleston, 5 Ga, 497-515.

The case of Wright, Comptroller General vs. the Southwestern R. R. Company, 64 Ga., 784, will be greatly relied on in this argument for establishing the proposition that the non-taxability of the shares in question is not an open question in Georgia; but for the present the case is cited as affecting the question of the

situs of the stock. In effect and by the strongest implication it fixes the *situs* of such shares at the corporation's domicil. It does so when it uses the following language (see page 799:)

"Stock held by the Company in railroads without the limits of the State is not taxable here. Stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

This case is further commented on at this point as furnishing a reply to the position taken by Counsel for the Comptroller General to the effect that the case of Dunbar vs. Augusta, 50 Ga., 392 fixed the *situs* of shares of stock at the domicil of their owner.

The case just quoted from in 64 Ga., after the quotation above made, proceeds to draw the distinction between "bonds, notes and all other mere evidences of debt" on the one hand, and shares of stock on the other. After having just declared that shares of stock in a foreign corporation are not taxable in Georgit, the Court goes on to say that bonds, notes and all other mere evidences of debt "follow the *situs* of the creditor no matter where the debtor lives." For sustaining this proposition the Court cites Dunbar vs. Augusta, supra——thus limiting, in the most unmistakable way, the application of that case to "bonds, notes and all other mere evidences of debt." Indeed even a casual examination of the Dunbar-Augusta case will show that anything said in it about *stocks* is clearly *obiter*. The sole question involved in the case was liability or non-liability to taxation of certain *bonds*, held by Dunbar.

It has been said above that there is no legislative enactment in Georgia fixing the *situs* of shares of stock in an incorporated company. This, however, is not strictly true. The tax act of 1898, under which this tax is demanded, and previous tax acts for many years fix the *situs* of shares of National Banks at the domicil of the bank, although the shareholders themselves may be residents of other States.

In Tappan vs. Merchants' National Bank, 19 Wallace, 490; the Court says on page 499:

"The power of taxation by any State is limited to persons, property, or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicil. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located."

Again, speaking of the nature of National Bank shares, the Court says:

"Shares of National Banks are personal property. They are made so in express terms by the Act of Congress under which such banks are organized. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own."

It will be observed that in this case the Court says in effect, in the language first above quoted, that a "law"—not necessarily a statute—can separate such property from the person of the owner and give it a *situs* elsewhere. We claim that there is such "law" in Georgia, and that it is found in the rule of property laid down in 64 Ga. above cited.

In the case of Jellenik vs. Huron Copper Mining Company, 177 U. S., 1, the Court decides clearly and unreservedly that shares in a Michigan corporation, owned by a citizen and resident of Massachusetts, have their *situs* in the State of Michigan.

It is true that this holding of the Court was made on a question of jurisdiction and not of taxation. It is also true that the Court says:

"Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it." But the reasons given by the Court for fixing the *situs* of the shares for the purpose of

jurisdiction are equally strong for fixing the taxing *situs*. After declaring that the shares are personal property, it uses this language:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicil of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is the real owner."

Observe that this is substantially the language used by the Supreme Court of Georgia in the Southwestern Railroad case, when it laid down the rule of property as affecting taxation of shares.

Corporations, in a very substantial sense, have possession of the shares—for instance in the matter of transfers—as trustees of the owners of the shares. In cases, too, of judgment against the stockholder, his shares are treated as being with the corporation and are levied on there.

Civil Code of Georgia, Sec. 5430.
See in this connection Civil Code of Georgia, Sec. 4976.
People's National Bank vs. Cleveland, 117 Ga., 908.

III.

THE QUESTION OF THE TAXABILITY OR NON-TAXABILITY OF SUCH SHARES NOT AN OPEN QUESTION IN GEORGIA.

In the case of Wright, Comptroller General vs. The Southwestern Railroad Company, supra, the Court, on page 799, uses this language: "(a) Stock in the company's own road, held by itself, or in other roads in this State, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; *and stock held by the company in railroads without the*

limits of this State is not taxable here. Stock in a railroad is really only so many shares of its property and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

But this deliverance by the Supreme Court of Georgia is attacked by the counsel for the Comptroller General on two grounds:

First. It is claimed that it was "a dictum of Judge Jackson," "was c'early not well considered at the time" and "was rendered on the preliminary injunction."

This deliverance of the Court was upon an issue directly made and was in no sense *obiter dictum.* The Court says on page 794:

"The numerous questions made as to different parts of the road and the liability of each portion or branch, most of them dependent for adjudication on separate charters and amendments, and *other questions* in respect to other items of property *in and out of the State and in what degree and how connected with the road and whether liable to be taxed* make the case complicated," etc.

This unanimous judgment of the Supreme Court of Georgia upon a question directly made is also subjected to the novel attack that it was rendered in a "preliminary injunction." This is no valid objection to the decision. The law in an injunction case is most generally settled at that stage of the case. In the case thus attacked the Court says on page 796:

"We think that on the hearing complete relief should be afforded, and the whole matter be investigated *to ascertain precisely what property of the Company should be taxed and what should not be taxed* * * * and in order to facilitate the trial, or a settlement, if desired, before trial, *we will indicate our opinion in regard to these matters now,"* and then proceeds to deliver the above ruling.

It is true that the Court says on page 801: "The views given above are merely indicative of what we now think, from our understanding of *this record as it now appears."* But the Court

also says in conclusion, page 801: "It is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and *the law as indicated above be applied to those facts* subject to be modified by the chancellor as *facts other than those in this record* may require."

It is not possible to conceive of authority more direct and unimpeachable for the proposition announced by the Court, viz: *"Stock held by the Company in railroads without the limits of this State is not taxable here."*

The "preliminary injunction" idea would be valuable if Counsel could show that the case went again to the Supreme Court, and that on said second hearing the Court recalled its previous rulings, and that the Comptroller General has in fact taxed the shares, which the Court in this "preliminary injunction" declared to be non-taxable.

Second. But the case of Wright, Comptroller General vs. Southwestern Railroad Company, it is alleged, is no longer authority, for the reason that it was a case decided prior to the Georgia Constitution of 1877.

Though this decision was made in a case originating prior to the Constitution of 1877, the laws relating to railroads, under which laws it arose, were precisely what they are now and have been ever since the Railroad Tax Act of February, 1874. The Constitution of 1877 did not, in the matter of railroad taxation, advance one inch beyond said Tax Act, which has ever remained in force, and is as comprehensive as any Act could be made by the Constitution of 1877. The Constitution added nothing to the stringency and thoroughness of that Act.

Then, as now, the presidents of railroad companies were required to return on oath to the Comptroller General the value of the property of their respective companies, each class to be separately named and valued, to be taxed as other property of the people of the State.

See Tax Acts of 1874-5-6.
Code of 1882, Sec. 826, a.
Code of 1895, Sec. 780.

Then, as now, the law of Georgia regarded shares, representing stock in incorporated companies, holding lands or a franchise in or over lands, as personalty.

Code of 1873, Sec. 2211.
Code of 1882, Sec. 2237.
Code of 1895, Sec. 780.

Again, it is urged by counsel for the Comptroller General that the case of Wright, Comptroller General, vs. the Southwestern Railroad Company, *supra,* was decided at a time when the Legislature of Georgia under its then Constitution could have exempted any property it saw fit to exempt from taxation; but that the Constitution of 1877 has taken that right from the Legislature.

This might be a pertinent argument against the decision if the decision were cited in support of a claim of *exemption* from taxation; but such is not the case. The decision is cited not as declaring or attempting to declare any property in Georgia exempt from taxation, but as laying down a *rule of property,* and declaring what is the *situs* of certain preperty, and as holding, also, incidentally, that the taxation of corporate property, and also the shares representing the corporate property is double taxation.

The case of Atlanta Building & Loan Association vs. Stewart, Tax Collector, 109 Ga., 80, seems to be considered by Counsel for the Comptroller General as furnishing some support to their contention. Why, is not very apparent. That decision announced propositions, not contested by counsel for the appellees, as to the liability of all property *in* the State of Georgia to taxation and as to the impotence of the Legislature to exempt such property from being taxed one time. But as to one of the controlling questions, viz.: *situs,* it is silent, and not at all in conflict with previous Georgia authorities: while on another controlling question, that of the taxation both of corporate property and the shares, into which it is divided, its deliverance, so far as it makes any, is in favor of the contention of these appellees, when it says: "Possibly it may be competent to provide

against taxing the shares of stock, where all the property which gives them value, has been taxed." But the Court then proceeds to declare that the decision is not to be taken as authority for or against that proposition. Indeed, this decision has no bearing on the case at bar. It is properly disposed of by the learned judge of the Circuit Court, from whose judgment this appeal is taken. After quoting the first two head notes of the decision, Judge Newman says:

"What is thus stated in the head notes, and more elaborately in the opinion, is beside the exact question involved here, which is, whether the State, for purposes of taxation, treats the shares in a railroad corporation as property, distinct and separate from that of the corporation which it represents. Unquestionably the effect of the decision of the Supreme Court of the State in Wright, Comptroller General General vs. Southwestern R. R. Co. *supra,* is that the State does not so regard shares of stock in railroad corporations located without the State.

"There is nothing whatever in this decision to the effect that the State treats shares of stock in corporations as separate and distinct from that of the corporation for purposes of taxation, when the corporation itself is taxed on the property which the shares represent."

Since the argument and decision of this case in the Circuit Court of Appeals, and since the Petition to this Court for Certiorari, the case of Wright, Comptroller General vs. The Southwestern Railroad Company, 64 Ga., 783—the case so vigorously assailed in the Brief of Counsel for Appellants, and in their Petition for Certiorari as being "not well considered" and as dealing with a condition of law, which was radically changed by the State Constitution of 1877—has been before the Supreme Court of Georgia and has been mentioned approvingly by said Court. This mention has not been casual, without consideration, or in any sense *obiter;* on the contrary the case is cited as direct authority for the proposition that the *situs* of shares of stock in a corporation is at the domicile of the corporation itself. That was the vital question in the case to-wit: Peoples' National Bank vs. Cleveland, 117 Ga., 908, decided April 8, 1903. In

this Cleveland case the Supreme Court of Georgia quotes the exact language of the decision in Wright vs. Southwestern Railroad Company *supra,* as follows:

"Stock in a railroad is really but so many shares of its property, and that property is real estate for the most part at least, and taxable by the State in which the road is located."

Whatever argument may have been made with some show of reason in the earlier stages of this cause against the authority of the Southwestern Railroad Company case, such argument is now out of the question.

SOME DISCUSSION OF THE CASE OF KIDD VS. ALABAMA, 188 U. S. 730.

The decision in this case is limited strictly to the contention of the Plaintiff in Error, which was that if foreign stock was considered by the laws of Alabama to be, by a fiction, present in Alabama for the purpose of taxation, it must be treated as present also for purposes of protection.

The "protection" sought was to be put on the same footing in the matter of taxation as domestic stock.

Limited to that narrow contention, to-wit: that the stock is taxed on the fiction of its presence, the Court holds that the claim of unequal protection of the laws is unsustained. The Court seems to say in effect that for all that appears the shares in this instance may have been taxed for the same reason that some domestic stocks were taxed, viz: because the property and franchise of the corporation are untaxed.

The Court says the argument for the taxpayer would have had more logical force, if he had denied the right to tax foreign stocks at all—though the Court adds: "We are far from implying that it would have been unaswerable or that it can be regarded as open."

The Court says on page 732: "The real grievance in a case like the present is that more than probably they are taxed elsewhere."

Further on the Court says: "No doubt it would be a great advantage to the country and to the individual States, if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided."

As legal authority Kidd vs. Alabama simply decides:

1. That a State may adopt the fiction that shares of stock held by its citizens in a foreign corporation are present at his domicil.

2. That with or without that fiction a State has *the power* to tax such shares. It does not in any degree weaken the position of Appellants, to-wit: that the State of Georgia has never adopted that fiction, but, on the contrary, has expressly denied it through her courts, early and late.

Wright, Comptroller General vs. The Southwestern R. R. Co., 64 Ga., 783.
Peoples' National Bank vs. Cleveland, 117 Ga., 908.

On the other hand, Kidd vs. Alabama gives all its weight to the support of Appellant's contention that the proposed taxation is in effect and substance double taxation and subject to the rules of construction and the consideration of right and justice applicable to double taxation.

Jos. B. Cumming.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 20.

WILLIAM A. WRIGHT, COMPTROLLER-GENERAL,
PETITIONER,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY
AND ATLANTIC COAST LINE RAILROAD COMPANY,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING.

JOS. B. & BRYAN CUMMING,
KING, SPALDING & LITTLE,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

No. 20.

WILLIAM A. WRIGHT, Comptroller-General, PETITIONER, *vs.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENTS.	On Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

Decree Reversed, November 14, 1904.

PETITION FOR REHEARING.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company, respondents in the above entitled cause, come during the term at which the decision and judgment therein was rendered by this Honorable Court, and before the time fixed by the Rules thereof for the mandate in said cause to be issued and transmitted to the Court below, and respectfully pray this Honorable Court to grant a rehearing in said cause, upon the following grounds, to-wit:

I. Petitioners show to this Court that for more than twenty (20) years from and after the passage of the Constitution of Georgia of 1877, the several departments of government of the State of Georgia acquiesced in and acted upon the decision of the Supreme Court of Georgia that "stock in a railroad is really but "so many shares of its property, and that property is real estate for

"the most part, at least, and taxable by the State in which the "road is located."

64 Ga., 799.

No taxes were levied on any railroad stocks, domestic or foreign, until the Comptroller-General made this demand of petitioners' lessor in the year 1901.

Transcript, pps. 4, 12, 16.

The Comptroller-General is now claiming that State, County and municipal taxes for each year since the Constitution of 1877 was adopted, with double taxes assessed as a penalty, and interest thereon, are due and collectable. It is thus claimed that the amount due upon the stock of the Western Railway of Alabama under the recent decision of this Court will reach nearly, if not quite $1,000,000.

II. Petitioners respectfully insist that the decision of this Court is erroneous, upon the following ground:

Said decision states:

1st. That in the light of the decision of Kidd vs. Alabama, *188 U. S. 730,* it was not claimed that any denial of petitioner's rights under the Constitution of the United States was claimed.

Petitioners respectfully insist that such denial of right was claimed to exist.

The bill of complaint charged:

"That the attempted collection * * * of taxes upon these "shares of stock of the Western Railway of Alabama and the "enforcement of such pretended tax, will take their property "without due process of law, and denies to them the equal protec- "tion of the laws, in violation of the 14th Amendment to the "Constitution of the United States, and is therefore illegal and "void."

Transcript, p 15.

The brief of King, Spalding & Little for petitioners, claimed on page 27:

"If it (the Act of 1898) leaves the rule that shares are not "property, and then seeks to tax some; as the Legislature of "Georgia cannot classify property for taxation, or exempt it, it "discriminates,—it denies the equal protection of the laws to "the owner of certain shares of stock by taxing them, while leav-"ing the owners of other shares of stock untaxed."

"Traveller's Insurance Co. vs. Connecticut, 185 U. S., 364.

"County of Santa Clara vs. Railroad Cos., 18 Fed. R. 385, 394, 395, 399, 401."

(a) This Court has held in this cause that the Act of 1898 and the Constitution of Georgia have left railroad shares in companies chartered by Georgia untaxed, and that the same are untaxed. Therefore we insist that, as the Constitution of Georgia prohibits all classification, an attempt made by this Act of 1898, or by the Comptroller-General of the State, to tax the railroad shares held by petitioners, deprives the holder of these shares of the equal protection of the law. It is evident that so far as the stockholder is concerned railroad shares in Georgia railroads are as much, or more, personal property as are shares in foreign railroads. Not to be taxed, they must be regarded as not constituting a separate taxable property.

The case of Kidd vs. Alabama, 188 U. S. 730, sustained the taxation of foreign railroad shares in that State as against this Constitutional objection, on the ground of classification. The Georgia Constitution prohibits classification for purposes of taxation. Taxation of foreign railroad stock as personalty in the State while not taxing domestic railroad stock, which is also personalty, must rest either on classification or exemption.

That the State taxes the property of the corporation in one case, and cannot in the other, does not affect the value of the

stock as personalty—it is only the reason for making the classification or exemption.

We insist therefore that so far from this case defeating a claim that the taxation of these shares impairs the rights of these petitioners under the Fourteenth Amendment of the Constitution of the United States, as the Georgia Constitution guarantees that domestic railroad shares cannot be classified apart from foreign railroad shares for the purposes of taxation, it clinches the proposition that this effort to tax foreign shares is an attempt to classify and tax them as a separate class, which denies to these shares the equal protection of the highest law enacted by Georgia, to-wit, her Constitution.

(b) It was insisted in this case that the law of Georgia defining what constituted taxable property had established the rule that shares of stock were not property in the hands of the stockholders, separate and apart from the property of the corporation.

That is was lawful for the State to regard shares as not being such separate property.

It is settled that the Georgia legislature can not classify property for taxation.

It is therefore insisted—the law of Georgia, regarding railroad shares as not property apart from the corporate assets—that the attempt to tax railroad shares in an Alabama Railroad Company while not taxing any railroad shares of Georgia companies denies to the holders of such first class of shares the equal protection of the law which places all shares of stock in one class, with all the other property of the tax payer.

If stock is not taxable property in Georgia apart from the corporate assets, and if the payment of taxes on such assets complies with the Constitution of Georgia, then we insist that the *assets* and their *situs* is to be looked to, to determine where the property is taxable.

If railroad stock is not a separate taxable value from the railroad

property to attempt to tax shares in an Alabama railroad company is to tax the railroad and property situate in Alabama. This is contrary to Constitution of United States.

Mercantile Bank vs. New York, 121 U. S. 138, 162.

III. It is further respectfully insisted that a rehearing should be had, because the decision in this case recognizes the rule of Georgia as to taxation, as follows: "It is admitted that no such "double taxation is enforced with regard to corporations of which "the property is taxed within the State, and it would hardly be "contended that this wise moderation is unconstitutional. It "even has been thought that a similar Constitution forbade taxa- "tion of both capital and stock."

This recognizes that these shares are not personal property subject to taxation etc., in the shareholders hands.

It is submitted that under this rule the following part of the decision of this Court is erroneous:

"The difficulty with this argument is that the Georgia Constitu- "tion requires the taxation of all property subject to be taxed in "Georgia. And while it may be that the constitutional require- "ment is sufficiently complied with when the land and chattels "which give value to the stock pay a tax, without another tax on "the stock, there is much more difficulty in saying that the words "are satisfied if stock is left untaxed when the land and chattels "can not be reached. Probably the Constitution does not go "further than to require one tax on all attainable sources of value, "even if it permits more. Burke vs. Badlam, 57 Cal. 594, 601. "But it certainly seems intended to tax once at least all property "which can be come at in any way."

It is respectfully submitted that as the constitutional requirement is met and a tax on "all attainable sources of value" is levied, where corporate assets in Georgia are taxed; the necessary consequence is, that where the assets of a corporation are

located outside of the state, then the "sources of value" not being property in the State, the State in attempting to levy on foreign shares would under Georgia law be levying on sources of value outside of the State.

IV. A rehearing is further asked because the decision fails to enforce the Constitution of Georgia which forbids any classification of property for purpose of taxation.

It is further submitted that the decision thus affirming that railroad shares in Georgia Companies are not taxable as personal property of the owner while requiring the taxation of railroad shares in companies of other States, ignores:

1st. That shares of railroad stock, as personal property of value, in the hands of the shareholders are not the same *thing* of value as the capital stock of the corporation, but in law are a separate thing of value.

"A tax on shares of stockholders in a corporation is a different "thing from a tax on the corporation itself, or its stock, and may "be had irrespective of any taxation of the corporation, when no "contract relation forbids.

Cooley on Taxation (2nd Ed.) 231.

2nd. That it is only through the doctrine that the shares of stock both domestic and foreign are different property from the corporate assets that they are regarded as personal property in possession of the holder.

If *any* share of stock therefore is not taxable in Georgia in the holders hands, it must be because it is not property subject to be taxed in the territorial limits levying the tax, in the view of the Georgia law.

No share of stock is *property exempt* from taxation.

Therefore, where a railroad share in a Georgia Railroad is not taxed, it must be because in the eye of the law it is not *for taxable*

purposes a separate property of value in the hands of the stockder.

But if any railroad share is not personal property in Georgia subject to be taxed, certainly *no* railroad shares can be personal property in Georgia subject to be taxed.

If this is not so, it is only because all railroad shares being personal property in the hands of the shareholders separate from the corporate assets, the law has attempted to divide them into two classes and to exempt one class of such shares from taxation, to-wit, domestic shares. (This is the utmost the legislature can have tried to do by the questions Nos. 30 and 31 of the Tax Act of 1898.)

But the legislature is prohibited from classifying or exempting any property except that named in the Constitution, for purposes of taxation. All *taxable* property is put by the Constitution in one uniform, unalterable class.

Mayor &c. vs. Weed, 84 Ga., 683, 686;
Ga. B. & L. Asso. vs. Savannah, 109 Ga., 63, 67, 68;
Atlanta Nat'l Asso. vs. Stewart, 109 Ga., 80, 97.

V. Said rehearing should be granted because an effect is given to section 3070 of the Civil Code of Georgia (classifying shares of stock as personalty), as making foreign shares of stock personal property subject to taxation, while domestic shares are not taxed in any way as personal property. We insist this is error because said section relates alone to shares in companies incorporated by Georgia, holding lands, and defines the interest thus created as personalty.

Yet, "it is admitted that no such double taxation is enforced "with regard to corporations of which the property is taxed within "the State."

Yet unless railroad shares are not property subject to taxation, they are personalty which is without any exemption.

VI. We respectfully insist that said decision is also in error in giving any effect to the Act of 1884-5, Sec. 2, p. 30, as declaring foreign railroad shares to be property taxable in Georgia. This Act, if of force, does not make any share of stock representing a fixed property, within or without the State, taxable. This is evidenced by an inspection of the whole Act.

1st. It clearly and expressly puts all stocks in corporations, domestic and foreign, on the same plane.

Section 1 of the same Act requires the return of "the amount of capital invested in stocks of companies other than such companies as are required to be *returned by the Presidents or their Agents, either to the Tax Receiver or Comptroller-General.*"

This excludes Railroad Corporations.

Then follows the Section II relied on.

Clearly this means in all corporations other than those returning for taxation the property which represents their capital.

This is evidenced by the fact that no department of the government made any effort to change the settled rule of taxation as to stocks in domestic or foreign corporations, or to collect taxes thereon. Executive action thus construes the law.

Miller vs. Wilson, Tax. Rec., 60 Ga., 505.

If it be assumed that this law intended to tax foreign railroad shares, clearly its first section intended to leave domestic shares untaxed.

Hence the effort was to classify railroad shares (in the hands of the holders), and it was illegal and unconstitutional.

This is likewise true of the Tax Act of 1898, if it attempts to tax foreign shares alone.

That the Act of 1884-5 is superseded by Code of 1895. See

Barnes vs. Carter, 120 Ga., 895, 897.

VII. A rehearing is also asked because the decision does not follow the decisions of the Courts of the State of Georgia fixing the status of shares of stock in railroad companies as taxable property.

The State of Georgia by decisions of her courts as far back as 1832 held that stock was not a thing of value to be taxed apart from the property it represented.

Bank vs. Savannah, Dudley's Rep. 130.

Georgia does not follow closely the rule *mobilia personam sequuntur*, in fixing the *situs* of intangible properties for taxation. Until the legislature enacted otherwise even debts had *situs* for taxable purposes where the debtor, and not where the creditor, resided. It took express statute to change this.

Bridges vs, Mayor &c., of Griffin, 33 Ga., 113, 115.
Armour & Co. vs. Augusta, 118 Ga., 552.

The decision of the supreme court of Georgia in the case of Wright, Comptroller-General, v. Southwestern Railroad Co., 64 Ga. 783, 799, was a solemn decision by a full bench on the status of railroad stock as property subject to taxation in Georgia.

Railroad stock in Georgia may be divided into three classes. First: railroad shares in the hands of third persons in companies having no exemption from taxation. Second: railroad shares in companies having exemption from taxation upon their properties generally, but taxed upon earnings instead. Third: railroad shares in railroad companies without the State of Georgia.

No question was made in the case (none has ever been made since), that railroad shares in Georgia corporations whose property was taxed, were not property subject to taxation.

But it was insisted:

(a) That where railroad companies did not pay taxes upon their property, but were exempt from taxation except a certain per cent. on income, the shares were taxable property in the hands of the holders.

(b) That where a corporation having such exemption, had acquired a part of its own shares, they were a part of its taxable property to be returned as such.

(c) That shares in foreign railroads held by Georgia corporations and individuals were taxable as property in Georgia.

The supreme court, deciding these questions, ruled:

"Stock in the company's own road, held by itself, or in other "roads in this State, whose charters limit or exempt taxation "thereon, is not liable; and stock held by the company in railroads "without the limits of this State is not taxable here. Stock in a "railroad is really but so many shares of its property, and that "property is real estate, for the most part, at least, and taxable "by the State in which the road is located."

The adjudication is not in any sense dicta, but the decision of the full bench on the exact point at issue. It is not dealing with *exemption*, but with the *status* and *situs* of railroad shares for taxation.

VIII. It is submitted that there should be a rehearing in this case because the decision rendered is in error as to the present status of the above case as controlling authority in Georgia.

There is no later decision which in any way attacks or questions the judgment of the supreme court that stock in foreign railroad corporations is not within the meaning of the Constitution and Laws of Georgia, property within the State subject to taxation, but that it is but so many shares of the railroad's property and taxable by the State in which the road lies.

The case of the Georgia State Building & Loan Association vs. Savannah, 109 Ga. 63, in no way deals with the above question. In that case the question involved was whether a building and loan association of Georgia must return for taxation its assets at their true market value, or whether it could return, under a Legislative Act so permitting, the market value of the stock of such association upon which no advance had been made or money borrowed, such tax to be in lieu of all other taxes and licenses whether, state, county, or municipal, against said corporation. The question of the taxability of stock in the hands of the shareholder was not involved, but the sole question was whether or not the Legislature could exempt the assets of the corporation from ad valorem taxation and substitute in lieu thereof the above measure. The court held that this could not be done. It said, "in other "words, by this Act the General Assembly of Georgia undertook "to fix an arbitrary basis of taxation against these associations "which should stand in the place of any other property tax, evi- "dently upon the idea that the taxing power had a right, in rais- "ing the revenue necessary for the support of the government, to "classify subjects of taxation. This our Constitution forbids when "applied to property."

So far from repudiating the proposition that shares of stock need not be regarded as separate property for the purpose of taxation, the decision provides:

"There are, in general, four methods of taxing corporate inter- "ests. These are—1st, by a tax on the franchise; 2nd, on the "capital stock; 3rd, on the real estate and personal property of "the corporation; 4th, by the taxing of the shares of stock in the "hands of the stockholders. * * * It is not incumbent on the "taxing power to impose a tax on each, but it may do so, and while "as a rule double taxation is not favored, whether it will be im- "posed or not rests with the taxing power—originally the legis- "lature."

If the legislature has undertaken to tax foreign railroad shares while leaving domestic shares untaxed, this decision supports the

proposition that where the State does not tax railroad shares as one class, it cannot tax railroad shares at all. The language is:

"If it was the intention of the General Assembly to limit the "power of the municipal authorities to tax the property of the "corporations referred to, then a serious question would arise as "to the power of the municipality to tax similar property of other "corporations and persons under the general legal duty to tax "all property alike."

109 Ga., 69.

In the present case it is conceded and decided that railroad shares in Georgia corporations are not taxed, and, classification being prohibited, we insist that an attempt to tax railroad shares in foreign corporations is unconstitutional.

The legislature has never attempted to make *all* railroad shares personalty subject to taxation. To hold therefore that any attempt it might make to depart from the rule that foreign railroad shares are non-taxable would have the effect to make all shares taxable, would be to make the legislature do what it expressly did not intend to do. An act cannot be held to have this effect in order to save it.

Virginia Coupon Cases, 114 U. S. 269, 305.

IX. A rehearing is further prayed on the ground that this decision denies to the decisions of the Supreme Court of Georgia fixing the situs of shares of capital stock for purposes of taxation, their proper effect as a rule of property in said State.

It is insisted that these decisions have fixed the situs of these shares out of the State, and not in Georgia.

That personalty need not have the same situs for purposes of taxation with its owner is well recognized.

This Court has recognized this in regard to shares of stock in National Banks.

"Shares of stock in National Banks are personal property * * " * * * * * * but the law which creates them may separate them "from the person of their owner for purposes of taxation, and "give them a situs of their own. This has been done."

Tappan vs. Bank, 19 Wall. 490, 500.

The State can equally do this through a rule of property established by the Courts.

"The same considerations apply to what is called exemption "from taxation of shares of stock of corporations created by other "States and owned by citizens of New York. * * * * * * * * "It is not pretended, however, that this exemption is based upon "the mere will of the legislature of the State. The Courts of New "York hold that they are not the proper subjects of taxation in "the State of New York, because they have no situs within the "territory for that purpose. *White vs. Commissioners of Taxes, "23 N. Y. 224. People ex rel Trowbridge vs. the Commissioners, "4 Hun. 595.* The objection would be equally good if made to the "non-taxation of real estate owned by citizens of New York, but "not within its limits."

Mercantile Bank vs. New York, 121 U. S. 138, 162.

The State of Georgia has not followed the rule that personal property has the same situs as its owner for purposes of taxation.

In determining where taxes on notes should be collected, the Court held that the owner should be taxed not where he resided, but where his debtor lived, saying:

"The fact that the owner of these debts resides in the city and "has the notes there, does not alter the fact. The notes are but "the evidences of the debt, while the debt itself is out of the city, "as a man's title deeds or bill of sale are the evidences of the "owner's right of property in his land and negroes; and it would "never be thought that land and negroes out of the City would "be liable to city taxes because the owner resided in the city and "kept his title deeds there."

Bridges vs. Mayor &c. of Griffin, 33 Ga. 113, 115.

Notes and other evidences of debt are now taxable when the creditor resides only by express statute.

Political Code, Section 776.

But the statute does not include stocks. Georgia, in order to avoid the inequality produced by one State taxing all the property rendering stock valuable, and another State taxing the stock at full value, has adopted the rule that for purposes of taxation stock in foreign corporations has no taxable situs in Georgia.

Wright vs. Railroad Co. 64 Ga., 783, 799.

This case has never been questioned since it was first decided. It has been twice mentioned by the Supreme Court of Georgia—once where it went again to the Supreme Court of Georgia, and the Supreme Court said that it was in all things affirmed.

Wright vs. Railroad Co. 68 Ga., 811.

Again, where the question of situs of stock was before the Supreme Court, and the Court quoted the decision in the 64 Ga., fixing the situs of foreign shares for taxable purposes out of the State, without any qualification.

People's Bank vs. Cleveland, 117 Ga., 908, 913, 915.

In no case has there ever been an intimation that shares in foreign railroad companies had any situs within the State for purposes of taxation.

X. A rehearing is also asked because this decision formally rendered by the Supreme Court of Georgia has the force and effect of a legislative act until formally reversed, as provided by law.

Heard & Russell vs. Potter, 59 Ga., 25, 54.

"A decision rendered by the Supreme Court prior to the first "day of January, 1897, and concurred in by three judges or

"justices, cannot be reversed or materially changed, except by the "concurrence of at least five justices, and then after argument "had, in which the decision by permission of the court is ex- "pressly questioned and reviewed, and after such argument the "court in its decision shall state distinctly whether it affirms, re- "verses or changes such decision."

Code of 1895, Sec. 5588, as amended by Georgia Acts of 1896, page 42.
Van Epps' Supplement to Code of Georgia, Sec. 6211

The only occasion on which this decision has been under review by the Supreme Court since 1897 is in the case of People's Bank vs. Cleveland, 117 Ga., above cited, and it is therein neither reversed nor modified, but quoted with apparently entire approval.

It is urged that this ruling is binding on the Federal Courts.

Bardon vs. Land Co. 157 U. S. 327, 351.

For which several reasons petitioners pray that the judgment heretofore rendered in this cause be set aside and a rehearing ordered and such other proceedings had as to justice shall appertain.

And petitioners will ever pray, &c.

Louisville and Nashville Railroad Company,

Atlantic Coast Line Railroad Company,

By their Solicitors,

JOSEPH B. CUMMING.

ALEX. C. KING.

We hereby certify that we have examined the foregoing petition for a rehearing and that in our opinion the same is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

Jos, B. Cumming.

Alex. C. King.
Of Counsel for Petitioners.

APPENDIX.

OPINION OF THE COURT.

SUPREME COURT OF THE UNITED STATES.

No. 20—October Term, 1904.

WILLIAM A. WRIGHT, Comptroller-General, PETITIONER,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE ATLANTIC COAST LINE COMPANY.

On Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

(November 14, 1904.)

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here on certiorari to the Circuit Court of Appeals, that court having affirmed, *per curiam* a decree of the Circuit Court enjoining the Comptroller-General of Georgia from collecting a tax for the year 1900. 116 Fed. Rep. 669. 117 Fed. Rep. 1007. In view of the conclusion to which we have been driven, it is enough to say that the question presented is whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad and Banking Company, a Georgia corporation, are taxable as property of the latter by the State of Georgia under its Constitution and statutes. The defendants in error, the plaintiffs below, are lessees of the Georgia corporation and are bound to reimburse the latter for the tax, if it has to be paid. Taking into account the decision in Kidd v. Alabama, 188 U. S. 730, the power of the State to tax the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present Constitution and laws.

The Constitution of Georgia provides that "all taxation "shall be uniform upon the same class of subjects, and ad

"valorem on all property subject to be taxed within the ter- "ritorial limits of the authority levying the tax and shall be "levied and collected under general laws." Code, 1895, Sec. 5883. The words "within the territorial limits" plainly qualify "subject to be taxed." The Constitution further makes void all laws exempting property from taxation other than the property therein enumerated, which does not include this stock. Sec. 5886. Following these requirements the General Tax Act for 1899 and 1900, Laws of 1898, No. 150, Secs. 1, 2, p. 22, authorizes a tax on all of the taxable property of the State.

The natural inference from the foregoing language is that the Comptroller General was bound to collect this tax. It is true that it was said, in a case decided before the date of the present Constitution, that stock in railroads outside the State was not taxable in Georgia, the reason offered being that stock is really but so many shares of the railroad's property, and that that property is real estate, for the most part at least, and taxable by the State in which the road lies. Wright v. Southwestern Railroad, 64 Ga., 788, 799. This reason is shown by later decisions to be an insufficient ground for a claim of constitutional right, and the language of the case probably does not represent adequately the present opinion of the Supreme Court, although the passages is cited in the latter cases of the two following cases: Georgia State Building and Loan Association v. Savannah, 109 Ga., 63, 69. The Peoples National Bank, Cleveland, 117 Ga., 903, 913, 915.

If we look to the construction adopted by the Legislature there is no doubt as to that. The Code after defining personalty as property movable in its nature, continues "stocks re- "presenting shares in an incorporated company holding lands, "or a franchise in or over lands, are personalty."—Sec. 3070. The act of 1884-1885, touching returns of property for taxation, No. 457, sec. 2, p. 30, enacted in terms "that personal "property shall be construed, for purposes of taxation, to in- "clude.....all stocks and securities, whether in corpora- "tions within this State or in other States, owned by citizens "of this State, unless exempt," &c. It is argued on one side and denied on the other that this section was repealed by the

Code, but whether it was or not, it equally may be invoked for the purpose of interpretation at least. We do not understand and cannot believe that the Supreme Court of the State would deny the power of the Legislature under the present Constitution to tax stock.

The argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the State are taxed once, and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes. It is admitted that no such double taxation is enforced with regard to corporations, of which the property is taxed, within the State, and it hardly would be contended that this wise moderation is unconstitutional. It even has been thought that a similar constitution forbade taxation of both capital and stock. Burke v. Badlam, 57 Cal. 594, 601. But, from the point of view of the tax-payer, it does not matter whether all of his double taxation is done in one State or half in one and half in another. He suffers the same injustice. And as manifestedly the clearest right to tax belongs to the State where the railroad has its track, every principle of justice and patriotism would require the same abstinence from taxing stocks of the railroads of neighboring States that is practiced with regard to those of the taxing State—in this case Georgia—itself.

The difficulty with this argument is that the Georgia Constitution requires the taxation of all property subject to be taxed in Georgia. And while it may be that the constitutional requirement is sufficiently complied with when the land and chattels which give value to the stock pay a tax, without another tax on the stock, there is much more difficulty in saying that the words are satisfied if the stock is left untaxed when the land and chattels cannot be reached. Probably the constitution does not go further than to require one tax on all attainable sources of value, even if it permits more. Burke v. Badlam, 57 Cal., 594, 601. But it certainly seems intended to tax once at least all property which can be come at in any way. San Francisco v. Fry, 68 Cal., 470. A tax in another State is no tax for the purpose of the State of Georgia, Kidd v. Alabama, 188 U. S., 730, 732. Dwight v. Boston, 12 Allen

816. Steward v. Rising Sun, 79 Indiana, 851. Dyer v. Osborne 11 R. I., 321. McKeen v. Northampton, 49 Pa. St., 519.

Putting the case at the lowest, the above cited section of the Constitution was adopted in the interest of the State as a tax collector, and authorizes, if it does not require, a tax on the stock. In pursuance of the Constitution, the law of 1898, under which this tax is demanded, contains the following:

"In addition to the questions now propounded to taxpayers "by the tax receivers, questions shall be framed by the Comp- "troller-General to reach all property upon which a tax is "imposed by this Act, and especially the following questions: "— — — — — — — — Thirtieth—How many shares of stock "did you own on the day fixed for the return of property for "taxation issued by corporations located without this State? "Thirty-first—What was the gross nominal value thereof? "Thirty-second—What was the fair market value thereof?" Laws of 1898, No. 150, Sec. 16, p. 86.

This plainly contemplates that the mandate of the Constitution shall be carried out, and in view of Sections 1, 2, of the same Act, referred to above, and of the facts that legislation could not make the requirement to tax more explicit, and that the Constitution seems to be regarded by the Supreme Court of the State as self-executing. Georgia State Building and Loan Association v. Savannah, 109 Ga. 63, we think it impossible to escape from the words. The distinction intended between stock in corporations of which the property is taxed by the State, and that in corporations otherwise untaxed is emphasized by the thirty-third question—"How "many shares of stock did you own.....issued by "corporations within this State, the capital stock of which or "the property of which is not returned by such corporation "for taxation?" We think the distinction consistent with the Constitution, if not required by it as held in Burke v. Badlam, cited above.

Decree Reversed.

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DEC 23 1904
SUPREME COURT U. S.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 20.

WILLIAM A. WRIGHT, Comptroller General,
Petitioner,

AGAINST

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents.

Memorandum for the Central Trust Company of New York, Trustee, in support of petition for re-hearing.

The Central Trust Company of New York is the trustee of two mortgages, viz: one made by the Central Railroad & Banking Company of Georgia, known as its collateral trust mortgage, securing $5,000,000 of bonds, and the other a mortgage of the Central of Georgia Railway Company, known as its second preferred income mortgage, securing $7,000,000 of bonds. The first mentioned mortgage constitutes a first lien upon fifteen thousand shares of stock of the Western Railway of Alabama, and the other mortgage is a junior lien upon said shares. The certificates are in possession of the trustee. They were formerly the property of the Central Railroad &

Banking Company of Georgia, and are now the property of the Central of Georgia Railway Company, subject to the said mortgages.

The effect of the decision rendered in this case upon the interests of the bondholders is serious, and if it is carried into effect the holders of the second preferred income bonds will undoubtedly sustain severe loss. For this reason the Central Trust Company of New York has asked permission to submit a few considerations in aid of the petition for rehearing, and this has been kindly accorded by the CHIEF JUSTICE.

The principal reason assigned for the reversal of the judgment of the lower courts is that the Constitution of Georgia, adopted since the decision of *Wright vs. Southwestern Railroad* (64 Ga. 783) provides that " all taxation shall be uniform upon the same class or subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws "; and that the Legislature of Georgia by certain general Acts has in substance provided that shares of stock are taxable in the hands of holders thereof, such shares being personalty and hence subject to taxation.

It is respectfully submitted that this view assumes what is not the precise fact; that is to say, it assumes that shares of stock in the hands of holders are necessarily personalty subject to taxation.

The property of a corporation is called its capital. The capital of a corporation is the same as the capital of an individual, and each is subject to the same taxation. It is not the paper certificates of shares of capital in a corporation that are taxed; they merely represent and evidence the distributive portions of the capital or substance of the company which should go to the different share owners upon the dissolution of the company, and it is this capital or substance which is taxed. The actual property, not the paper certificates representing it, is what is taxed. To tax the property and then the paper certificates representing it would be taxing the same property twice. It would be the same as taxing so many acres of land and then taxing the title deeds of it. (See

People ex rel. Brooklyn Traction Co. vs. Board of Assessors, 61 N. Y. State Reporter, 480.)

The Supreme Court of Georgia accordingly held in the case above referred to (64 Ga. 783) that stock in a railroad is really but so many shares of its property, and that property is real estate for the most part at least and taxable by the State in which the road is located; and that therefore stock held by a Georgia Company in railroads without the limits of the State was not taxable in Georgia.

There is nothing in the Georgia Constitution of 1877 or in the acts of the Legislature of Georgia which does away with the principle thus enunciated.

The decision in the case at bar further proceeds upon the theory that while it may be that shares of Georgia corporations are not taxable as personalty because the property of the corporation itself is subject to taxation, yet shares of stock of corporations of other States are taxable because the corporation pays no tax in Georgia. But the courts have not hitherto founded their decisions on this subject upon any such distinction.

Where it is sought to tax corporate shares in the hands of the holders, the courts have not placed their decisions exempting such shares from taxation upon the ground that the corporation paid taxes in the State where it was sought to tax the shares, but on the ground that the corporation paid taxes somewhere, namely, in the country of its domicile.

In New York the statute provides that the owner of stock of a corporation liable to taxation on its capital shall not be taxed as an individual for such stock. The courts of New York have held that this exemption applies to stocks of foreign corporations, as well as of domestic corporations, and that residents of New York owning shares of stock in a corporation of a foreign State are not subject to be assessed and taxed thereon in New York, *because the presumption is that such corporations are taxed upon their capital in the home States.*

In *People ex rel. Trowbridge vs. Commrs. of Taxes*, 4 Hun 595 (affirmed, 62 N Y 630) the court by DAVIS, Presiding Justice, says:

"Such corporations [that is to say, corporations of other

States] are taxable, and we must presume in the absence of proof that taxes in their respective home States are duly assessed and collected upon their capital stock or property. The stocks in such corporations held by individuals here are simply representatives of capital or property employed in business in other States, the title of which is vested in and controlled by the artificial person created and by residing in such States. They represent an interest which is or may become a membership in the corporation, and evidence of a right to participate in divided profit and in the ultimate dividend of a surplus after the payment of all debts and obligations of the corporation. The stock certificates are not themselves the property, but are evidences of the rights just mentioned to be possessed, enjoyed and enforced under and in conformity with the laws of the State which created the body corporate."

If this be a correct statement of the law, as we respectfully submit it is, then the rule that shares of stock will not be taxed in the hands of the owners unless the Legislature has expressly so declared, is applicable to stocks of foreign corporations as well as of domestic corporations. The case last cited is approved in *People vs. Pacific Mail S. S. Co. v. Commrs. of Taxes*, 5 Hun, 200; affirmed, 64 N. Y. 541, and *People ex rel. Brown vs. O'Rourke*, 35 App. Div. 583, p. 589.

It is conceded in the record and admitted by the opinion that no such double taxation is enforced with regard to Georgia corporations, and it is said that "the argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the State are taxed once, and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes."

It is respectfully submitted that this does not accurately state the argument against the tax. The argument is that neither the Constitution of Georgia nor the acts of its Legislature contemplate the taxation of shares of stock of railroad companies either of Georgia or of other States.

It will be observed that if the decision in the present case shall stand, the result will be that the taxing officers of the State of Georgia will possess a power which the Legislature itself does not possess. Logically, if shares of stock of a for-

eign corporation are taxable in Georgia, shares of stock of domestic corporations must also be taxed, for the Constitution of Georgia forbids any classification or exemption. To tax shares of a foreign corporation and to refuse to tax shares of a domestic corporation is manifestly a classification of personal property for purposes of taxation.

It is unnecessary to repeat or to present in another form the various considerations set forth in the petition for a rehearing. In view of the importance of the case and the large amounts involved, it is respectfully submitted that no injustice will be done by according an opportunity to reargue the case.

ADRIAN H. JOLINE,
Of Counsel for Central Trust Company
of New York.

Supreme Court of the United States.

No. 20.—October Term, 1904.

William A. Wright, Comptroller General, Petitioner, *vs.* The Louisville & Nashville Railroad Company and The Atlantic Coast Line Company.	On writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 14, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here on certiorari to the Circuit Court of Appeals, that court having affirmed, *per curiam*, a decree of the Circuit Court enjoining the Comptroller General of Georgia from collecting a tax for the year 1900. 116 Fed. Rep. 669. 117 Fed. Rep. 1007. In view of the conclusion to which we have been driven, it is enough to say that the question presented is whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad and Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia, under its Constitution and statutes. The defendants in error, the plaintiffs below, are lessees of the Georgia corporation and are bound to reimburse the latter for the tax, if it has to be paid. Taking into account the decision in *Kidd* v. *Alabama*, 188 U. S. 730, the power of the State to tax the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present Constitution and laws.

The Constitution of Georgia provides that "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Code of 1895, § 5883. The words "within the territorial limits" plainly qualify "subject to be taxed." The Constitution further makes void all laws exempting property from taxation, other than the property therein enumerated, which does not include this stock. § 5886. Following these requirements the General Tax Act for 1899 and 1900, Laws of 1898, no. 150, §§ 1, 2, p. 22, authorizes a tax on all of the taxable property of the State.

The natural inference from the foregoing language is that the Comptroller General was bound to collect this tax. It is true that it was said, in a case decided before the date of the present Constitution, that stock in railroads

outside the State was not taxable in Georgia, the reason offered being that such stock is really but so many shares of the railroad's property, and that that property is real estate, for the most part at least, and taxable by the State in which the road lies. *Wright* v. *Southwestern Railroad*, 64 Ga. 783, 799. This reason is shown by later decisions to be an insufficient ground for a claim of constitutional right, and the language of the case probably does not represent adequately the present opinion of the Supreme Court, although the passages is cited in the later of the two following cases. *Georgia State Building & Loan Association* v. *Savannah*, 109 Ga. 63, 69. *Peoples' National Bank* v. *Cleveland*, 117 Ga. 908, 913, 915.

If we look to the construction adopted by the Legislature there is no doubt as to that. The Code, after defining personalty as property moveable in its nature, continues "stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, are personalty." § 3070. The act of 1884–1885, touching returns of property for taxation, no. 457, § 2, p. 30, enacted in terms "that personal property shall be construed, for purposes of taxation, to include . . . all stocks and securities, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt," &c. It is argued on one side and denied on the other that this section was repealed by the Code, but whether it was or not, it equally may be invoked for the purpose of interpretation at least. We do not understand and cannot believe that the Supreme Court of the State would deny the power of the Legislature under the present Constitution to tax stock.

The argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the State are taxed once, and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes. It is admitted that no such double taxation is enforced with regard to corporations, of which the property is taxed, within the State, and it hardly would be contended that this wise moderation is unconstitutional. It even has been thought that a similar constitution forbade taxation of both capital and stock. *Burke* v. *Badlam*, 57 Cal. 594, 601. But, from the point of view of the taxpayer, it does not matter whether all of his double taxation is done in one State or half in one and half in another. He suffers the same injustice. And as manifestly the clearest right to tax belong to the State where the railroad has its tracks, every principle of justice and patriotism would require the same abstinence from taxing stocks of the railroads of neighboring States that is practiced with regard to those of the taxing State—in this case Georgia—itself.

The difficulty with this argument is that the Georgia Constitution requires the taxation of all property subject to be taxed in Georgia. And while it may be that the constitutional requirement is sufficiently complied

with when the land and chattels which give value to the stock pay a tax, without another tax on the stock, there is much more difficulty in saying that the words are satisfied if stock is left untaxed when the land and chattels cannot be reached. Probably the Constitution does not go further than to require one tax on all attainable sources of value, even if it permits more. *Burke* v. *Badlam*, 57 Cal. 594, 601. But it certainly seems intended to tax once at least all property which can be come at in any way. *San Francisco* v. *Fry*, 63 Cal. 470. A tax in another State is no tax for the purposes of the State of Georgia. *Kidd* v. *Alabama*, 188 U. S. 730, 732. *Dwight* v. *Boston*, 12 Allen, 316. *Seward* v. *Rising Sun*, 79 Indiana, 351. *Dyer* v. *Osborne*, 11 R. I. 321. *McKeen* v. *Northampton*, 49 Penn. St. 519.

Putting the case at the lowest, the above cited section of the Constitution was adopted in the interest of the State as a tax-collector, and authorizes, if it does not require, a tax on the stock. In pursuance of the Constitution, the law of 1898, under which this tax is demanded, contains the following: "In addition to the questions now propounded to tax-payers "by the tax-receivers, questions shall be framed by the Comptroller-Gen- "eral to reach all property upon which a tax is imposed by this Act, and "especially the following questions . . . Thirtieth—How many shares "of stock did you own on the day fixed for the return of property for "taxation issued by corporations located without this State? Thirty- "first—What was the gross nominal value thereof? Thirty-second— "What was the fair market value thereof?" Laws of 1898, no. 150, § 16, p. 36. This plainly contemplates that the mandate of the Constitution shall be carried out, and in view of §§ 1, 2, of the same act, referred to above, and of the facts that legislation could not make the requirement to tax more explicit, and that the Constitution seems to be regarded by the Supreme Court of the State as self-executing, *Georgia State Building & Loan Association* v. *Savannah*, 109 Ga. 63, we think it impossible to escape from the words. The distinction intended between stock in corporations of which the property is taxed by the State and that in corporations otherwise untaxed is emphasized by the thirty-third question: "How "many shares of stocks did you own, . . . issued by corporations "within this State, the capital stock of which or the property of which is "not returned by such corporation for taxation?" We think the distinction consistent with the Constitution, if not required by it as held in *Burke* v. *Badlam*, cited above.

Decree reversed.